In the Supreme Court

OF THE UNITED STATES.

98

THE UNITED STATES

vs.

ANDRES CASTILLERO,

On Cross Appeal.

Claim for the Mine and Lands of New Almaden

ARGUMENT OF A. C. PEACHY,

For the Claimant.

Statement of the Documentary Evidence of Title.

May it please the Court:

I think it best to premise my argument, by reading the documents on which the claimant relies as evidence of his title; I shall therefore begin with a statement of the Documentary Evidence of Title.

In this statement I shall give the translations only. The originals can be easily referred to.

The documents of title on which we rely, are the following:

First. CASTILLERO'S FIRST REGISTRY.

"Señor Alcalde of First Nomination:

Andres Castillero, Captain of permanent cavalry, and at present resident of this Department, before your notorious justification, makes representation: that having discovered a vein of silver, with a ley of gold, on the land of the rancho pertaining to José Reyes Berreyesa, retired sergeant of the presidial company of San Francisco, and wishing to work it in company, I request that in conformity with the ordinance on mining, you will be pleased to fix up notices, in public places of the jurisdiction, in order to make sure of my right when the time of the juridical possession may arrive, according to the laws on the matter. I pray you to provide in conformity, in which I will receive favor and justice; admitting this on common paper, there being none of the corresponding stamp.

Pueblo of San José Guadalupe, November twenty-second, eighteen hundred and forty-five.

ANDRES CASTILLERO."

The original of this communication was retained in the Alcalde's office of San José, until it was transferred to the Mayor's office at that place in 1850, whence it was taken in January, 1851, and filed in the Recorder's office of Santa Clara County, where it now exists.

Second. CASTILLERO'S AMENDED REGISTRY.

"Señor Alcalde of First Nomination:

I, Andres Castillero, permanent captain of cavalry, before your well-known justification, appear and say: that on opening the mine which I previously denounced in this Court, I have taken out, besides silver with a ley of gold, liquid quicksilver, in the presence of several bystanders, whom I may summon on the proper occasion. And, considering it necessary for the security of my right so to do, I have to request of you, that uniting this representation to the denouncement, it may be placed on file, it not going on stamped paper because there is none. I pray you to take measures to this effect, in which I will receive favor and grace.

Santa Clara, December 3, 1845.

ANDRES CASTILLERO."

The history of the custody of this document is the same as that of the foregoing.

Third. THE ACT OF JURIDICAL POSSESSION.

"There being no deputation on mining in the Department of California, and this being the only time since the settlement of Upper California that a mine has been worked in conformity with the laws, and there being no 'Juez de Letras,' (professional Judge) in the second district, I, the Alcalde of First Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office, for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the rancho of the retired sergeant, José Reyes Berryesa, the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this court has; and as the laws now in force so strongly recommend the protection

of an article so necessary for the amalgamation of gold and silver in the Republic; I have granted three thousand varas of land in all directions, subject to what the General Ordinance of Mines may direct, it being worked in company; to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the expediente, deposited in the archives under my charge; this not going on stamped paper, because there is none, as prescribed by law.

Juzgado of San José Guadalupe, December —, 1845.

(Signed) ANTONIO MARIA PICO.

Assisting witnesses:
Antonio Suñol,
José Noriega."

This record of juridical possession is the original preserved by the Alcalde in the archives of his Court. This original, like Castillero's two representations, was retained in the archives of the Juzgado at San José; and when the old Alcalde system was replaced in 1850 by the municipal authorities of the city of San José, it passed into the Mayor's office, whence in January, 1851, it was taken to the office of the County Recorder of Santa Clara County and filed, where it has remained to the present time.

Fourth. The Ordinances of 1783 provide that the written statement of the discoverer, having been noted in substance in the Book of Registry, shall be returned to the discoverer for his security, and that there shall also be given him *as his corresponding title* a certified copy (*copia autorizada*) of all the proceedings connected with the giving of possession.

Castillero's written statements, or representations in registry, were not returned to him, but remained in the office of the Alcalde. He received however certified copies of them on the 13th January, 1846, signed by Pedro Chavoya, Alcalde, and by José Suñol and Pedro Sainsevain, attesting witnesses.

The *copia autorizada* of the record of juridical possession was delivered to Castillero. It is an exact copy of the original record, with the exception that in the original the date of the act of possession is December —, 1845, while in the *copia autorizada* it is December 30th, 1845.

The two certified copies of Castillero's written statement in Reg-

istry, just mentioned, and the *copia autorizada* of the record of juridical possession, are in evidence.

Fifth. While Castillero was yet in California, he addressed two letters, dated respectively, Mission of Santa Clara, nineteenth and twenty-second of February, 1846, to J. J. de Herrera, former President of Mexico, and also a letter written from the same place, on the nineteenth of the same month, to Don Tomas Ramon del Moral.

These letters, together with specimens of cinnabar and of other ores from several parts of the State, were sent to Mexico by the hands of the Sergeant, Lazaro Piña, who sailed from Monterey for Mazatlan, on the seventh of March, 1846, in the brig Hannah.

Señor Herrera, furnished Señor Moral with extracts from Castillero's two letters to him, in a note dated Mexico, thirteenth of April, 1846.

A copy of the foregoing note, and also a copy of Castillero's above mentioned letter to Señor Moral, and also some specimens of the cinnabar and coal which Castillero had sent by Piña, were sent to the Junta de Fomenta y Administrativa de Mineria, by Señor Moral, somewhere about the middle of April, 1846.

Copies of the documents thus furnished the Junta by Señor Moral, are in evidence. They are as follows:

Señor Don Andres Castillero, commissioned last year by the Supreme Government to pass to California on an object of public service, tells me, in letters written from the Mission of Santa Clara, on the nineteenth and twenty-second of February of this year, that which follows:

"At the distance of five leagues from this Mission, to the west, I have discovered and denounced a very abundant mine of quicksilver, and to confirm my truth, I send you some ores of those which have been taken from the top of the vein; a little quicksilver also goes, which we have taken out with the greatest facility. The Señor Director of the College of Mining, Don Ramon del Moral, will receive much pleasure in seeing equalled the ores of Almaden. From the width of the vein, and the abundance of metals taken out, within one year, with the protection of the Supreme Government, the Republic will not need quicksilver from foreign parts. I send you some trifles made by the Indians of the northwest, and products of this country. Coal is very abundant, and is found on the

coasts of the Bay of San Francisco, so that steamers, sending out their small boats, may load all that they require: this discovery was made by Colonel Don Juan Bautista Alvarado: the rock crystal is a very large hill."

Copy. Mexico, April 13th, 1846.

J. J. De Herrera.

Señor Director of the College of Mining,
Don Ramon del Moral.

Mission of Santa Clara,
February 19th, 1846.

My Esteemed Friend and Appreciated Sir:

You know how devoted I am to the branch of mining, and intent upon finding a mine of quicksilver. I have discovered a most abundant deposit. With this I send to His Excellency, the President, some ores of cinnabar, and a little quicksilver. We are forming a furnace, and have assayed said metal in a musket barrel, the touch hole stopped with clay, and the muzzle put in water; in this manner it has given us thirty per cent. I would esteem it a favor if you would take the trouble, for the sake of the public good, to cause this metal to be assayed, as this operation depends upon your work. May you and all the family retain good health; and, as much as you please, command your

Obedient servant, &c., &c.,

Andres Castillero.

Sixth. The Junta de Fomento, on the twenty-first of April, 1846, sent the said specimens to the Director of the College of Mining for assay; they also sent him copies of Castillero's letters to Herrera and Moral, and addressed to him the following letter:

Mining Junta and
Administration of Mining.

April 23d, 1846. Transmit to the Junta Facultativa of the College, with preference.

Tornel.

Excellent Sir:—Señor Don Tomas Ramon del Moral having presented to the Junta some specimens of cinnabar from the Mission of Santa Clara, in Californias, which Señor Don Andres Castillero sends him, together with the annexed copies, with the object of inciting the Supreme Government that it may be pleased to aid so important an enterprise, has the honor of transmitting to your Excellency said specimens, with the view that the proper assay of the cinnabar should be made in the laboratory of that College, letting the Junta know, without delay, the result.

And with this motive the Junta has the honor to repeat to your Excellency the protestations of its consideration and esteem.

God and Liberty. Mexico, April 21st, 1846.

VICENTE SEGURA, President.

The Secretary being occupied,

YSIDRO R. GONDRA, First Clerk.

To His Excellency, GENERAL DON JOSE MARIA TORNEL, Director of the National College of Mines.

Seventh. In reply to the foregoing communication, General Tornel, Director of the College of Mining, on the twenty-ninth of April, 1846, addressed to the Junta de Fomento the following:

DIRECTION OF THE NATIONAL COLLEGE OF MINING.

Received the third day of this present May.

V. SEGURA.

May 4th, 1846.

Let it be transmitted to the Government, manifesting that the communication was only received yesterday.

Don Tomas Ramon del Moral, President of the Junta of Encouragement of the National College of Mining, in an official communication of the twenty-fourth ultimo, says to me as follows:

"Excellent Sir:—The Junta Facultativa having examined the documents which your Excellency referred to on the twenty-first of the present month, relative to a deposit of cinnabar discovered in California by Señor Don Andres Castillero, and another of coal in the Bay of San Francisco, has the honor to inform your Excellency that the specimens sent by said Castillero were deposited, some in the Mineralogical Cabinet, and others assayed by the Professor of Chemistry, Don Manuel Herrera. The assay gave a ley of thirty-five and a half per cent., a mixture of the different specimens having been taken to make the assay, for there are some so rich that they are pure cinnabar. The Junta believes that Señor Castillero has, by such an important discovery, made himself deserving of the efficacious protection of the Supreme Government, and of the Junta for the Encouragement of Mining, and is persuaded that your Excellency will interpose all your influence to the effect that this individual may receive a proof that the Supreme Government knows how to distinguish and reward those citizens who contribute to the prosperity of the country. And with this motive I repeat to your Excellency the considerations of my esteem and respect.

And I have the honor to transmit it to your Honors as the result of your despatch on the matter.

God and Liberty. Mexico, April 29th, 1846.

JOSE MARIA TORNEL."

To the President and Members of the Junta for the Encouragement of Mining, of the National College of Mining.

Eighth. Having thus acquired the necessary information on the subject, the Junta de Fomento in discharge of one of the principal duties imposed on them by law, addressed to the Supreme Executive, through the Ministry of Justice, the following communication, on the 5th May, 1846.

JUNTA FOR THE ENCOURAGEMENT AND ADMINISTRATION OF MINING.

No. 573. Communicates the discovery of a deposit of cinnabar, made in the Presidio of Santa Clara, in Lower California, the assays of which have yielded the highest ley known, and with this motive communicates the result of the quantity of quicksilver extracted until the end of March, in Guadalcazar.

May 9th, 1846. Noted with satisfaction the discovery, and of having asked already of Señor Castillero the kind of resources he requires

Noted also, the statement given of the quicksilver extracted by the miners of Guadalcazar.

Most Excellent Sir:—Professor Don Tomas Ramon del Moral having presented to this Junta some specimens of cinnabar from the Mission of Santa Clara, in Lower California, which Don Andres Castillero sent him, together with the annexed copies, with the object of inciting the Supreme Government, that it may be pleased to aid so important an enterprise, said specimens were immediately sent to his Excellency, the Director of the College, that the proper assays might be made. His Excellency, in an official communication of the twenty-ninth of last month, received yesterday, says that which follows: 'Señor Don Tomas del Moral, President of the Junta Facultativa of the National College of Mining, in an official communication of the twenty-fourth ult., says to me as follows: 'Most Excellent Sir—The Junta Facultativa having examined the documents which your Excellency referred to on the twenty-first of the present month, relative to a deposit of cinnabar discovered in California by Señor Don Andres Castillero, and another of coal on the Bay of San Francisco, has the honor to inform your Excellency that the specimens sent by said Señor Castillero were deposited, some in the Mineralogical Cabinet, and others assayed by the Professor of Chemistry, Don Manuel Herrera. The assay gave a *ley* of thirty-five and a half per cent., a mean of the different specimens having been taken to make the assay, for there are some so rich that they are pure cinnabar. The Junta believes that Señor Castillero has, by such an important discovery, made himself deserving of the efficacious protection of the Supreme Government and of the Junta for the Encouragement of Mining, and is persuaded that your Excellency will interpose all your influence to the end that this individual may receive a proof that the Supreme Government knows how to distinguish and reward those citizens who contribute to the prosperity of the country.'

'And with this motive, I repeat to your Excellency the con-

siderations of my esteem and respect. And I have the honor to transmit it to your Excellencies, as the result of your dispatch on the matter.'

The Junta, on inclosing the foregoing communication to your Excellency, has the honor to inform you that it has already asked Señor Castillero what kind of aid or protection he needs for the encouragement of his brilliant enterprise, congratulating the Supreme Government on a discovery, which, if it meets, from the beginning, with all the protection it deserves, may change completely the aspect of our mining, freeing it from the necessity in which it has been until now, of foreign quicksilver. With this motive, the Junta takes advantage of the opportunity to inform your Excellency that, as on the twenty-fourth of this month, the bounty terminates which the law granted, of five dollars premium on each hundred weight of quicksilver extracted from the mines of the nation, the miners of Guadalcazar have proved that they have taken out one thousand five hundred and seventy-five quintals, from December, eighteen hundred and forty-four, to the end of March last, which result exceeds the calculation, which, until now, has been made, that the product of this mineral was one hundred quintals per month. The Junta, on this occasion, reiterates to your Excellency the assurances of its distinguished consideration and esteem.

God and Liberty. Mexico, May 5th, 1846.

VICENTE SEGURA, President.

The Secretary being occupied,

YSIDRO R. GONDRA, First Clerk.

To His Excellency, the Minister of Justice.

Ninth. On the ninth of May, 1846, the Minister of Justice, in reply to the foregoing communication, addressed the following to the Junta de Fomento:

MINISTRY OF JUSTICE AND PUBLIC INSTRUCTION.

Most Excellent Sir:—By your Excellency's note of the fifth inst., and copies which you were pleased to transmit therewith, His Excellency, the President *ad interim* of the Republic, learns with satisfaction that in the Mission of Santa Clara, of Upper California, Señor Don Andres Castillero has discovered a deposit of cinnabar of excellent quality, according to the assays made in that College, and that said Señor Castillero has been asked by that Junta what kind of assistance he needs to encourage his brilliant enterprise. His Excellency is likewise informed of that which the Junta reports relative to the quantity of quicksilver extracted from the mines of

Guadalcazar, the result of which has exceeded the calculations which were made. This is what I have the honor to say to your Excellency in answer, repeating to you with this opportunity the assurances of my consideration and esteem.

God and Liberty. Mexico, May 9th, 1846.

BECERRA.

His Excellency, Don VICENTE SEGURA,
President of the Junta for the Encouragement of Mining.

Tenth. Castillero having appeared before the Junta de Fomento, and given a verbal account of his discovery, as appears from their minutes; and having been requested to make a written statement as to what aid he required from the Government in the prosecution of his brilliant enterprise, handed in to the Junta on the twelfth of May, 1846, the following proposals:

Stamp third.—Four Reales.—For the years eighteen hundred and forty-six and eighteen hundred and forty-seven.

I, Andres Castillero, resident and miner in the Department of Upper California, before your Excellency and your Honors, as I best may proceed, say: That, having discovered in the Mission of Santa Clara a mine of quicksilver, of *leyes* as rich, certainly, as were ever seen before, not only in the Republic, but perhaps in all the world, as proved by the assays made by the order of the Junta Facultativa of the College of Mining, which, mixing together of all the specimens I brought, from the best to the worst, have given a result of thirty-five and a half per cent., while there have been specimens of the best kind which must produce much greater *leyes*, I see myself in a condition to satisfy my desires in favor of the progress of my country, of benefiting exclusively Mexicans by the flattering and well founded hopes which such a discovery offers. In virtue of this, I have denounced and taken possession not only of said mine named Santa Clara, but also of an extent of three thousand varas in all directions from said point. I have formed a company to work it. I have constructed the pit, and complied with all the conditions prescribed by the ordinance; the mine yielding ore, with the notable circumstance that the specimens which I brought and which have been assayed, have been taken out of the mouth. It would have been very easy for me to have given the necessary extension to the negotiation by accepting the repeated and advantageous offers which have been made to me by several foreign houses in California; but as the undertaking does not require that kind of assistance, which would result in advantage to foreigners, when it may be entirely national; and I have not, for that reason, hesitated to apply to your Excellency and your Honors,

to obtain the small and only resources which I need. These are reduced to a small advance of five thousand dollars in money, in consideration of the excessive scarcity of coin in that Department, and the quick remittance to it of retorts, cylinders, and other small distilling apparatus, as also iron flasks, for bottling up the quicksilver. I would have proposed a contract of partnership to the Junta, an "avio," or some other agreement, if there had been time to be able to furnish the proofs and details which would be required for said contracts; but being under promise to the Supreme Government to leave this capital within a few days, I find it necessary to restrict myself to that which appears to present no difficulty, and which may open a way to our future agreements; I am well persuaded that the Junta will accede to my request so far as may be within its powers, and that it will send up to the Supreme Government with a recommendation that which may require the decision of the latter. My propositions, then, are the following:

First. The Junta, in the act of approving the agreement, will give me a draft for five thousand dollars on some mercantile house in Mazatlan.

Second. On my part, I bind myself to place in said port within six months after leaving it, fifty quintals of quicksilver, at the rate of one hundred dollars each, which I will send from the first taken out, with absolute preference over every other engagement.

Third. The Junta will order that there be placed at my disposition, before leaving the capital, the eight iron retorts which it has in its office, and all the quicksilver flasks which can be found in the *negotiation* of Tasco, which are fit for use; and lastly, it will deliver to Señor Don Tomas Ramon del Moral, my attorney, the sums to pay for the retorts, cylinders, and other kinds of small apparatus which may be ordered to be made for the *negotiation*, to the amount of one thousand dollars.

Fourth. I will receive the retorts of the Junta at cost price, and the flasks which I may select, at two dollars apiece, agreeably with their valuation.

Fifth. The ascertained value of said retorts and flasks, and that of the sums which may be delivered to Señor Moral, I will repay in the term of one year from this agreement, and also the premium on the draft on Mazatlan, in quicksilver, placed in said port at the price of one hundred dollars a quintal; but if the Junta should wish to take one or more "acciones" in the mine, it shall be left as a part payment of the sum corresponding to one or more "barras."

Sixth. While the company is being formed, during the period of one year, counted from the date on which this agreement shall be approved, and the five thousand dollars spoken of in the first proposition being paid, I will give the preference to the Junta in

the sale of the quicksilver placed in Mazatlan, at the rate of one hundred dollars the quintal.

Seventh. The Junta shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine by the local authorities of Californias, in the same terms as those which I now hold it.

Eighth. It shall also represent the advantage of there being granted to me as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my burnings.

Ninth. For the compliance of this contract, I pledge the mine itself and all its appurtenances.

The subscriber submits this request to the deliberation of the Junta, which, if accepted, may be made into a formal contract, and made legal in the most proper manner.

God and Liberty. Mexico, May 12th, 1846.

ANDRES CASTILLERO.

Eleventh. Retaining in their office a copy of the foregoing proposals of Castillero's, the Junta de Fomento transmitted the original to the President of the Republic, inclosed in their communication of the fourteenth of May, 1846, to the Minister of Justice. In this communication they urge the Government to accept the proposals.

JUNTA FOR THE ENCOURAGEMENT AND ADMINISTRATION OF MINING.

No. 575.

Accompanies with recommendation the petition of Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara in Upper California.

May 20, 1846.

Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations, for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition.

[Rubric of Becerra.]

Most Excellent Sir:—As this Junta had the honor to inform your Excellency on the fifth inst., in Number 573, Señor Don Andres Castillero has directed to it a petition, the original of which it has the pleasure to transmit herewith, regarding the assistance which he needs for the new discovery of the quicksilver mine in the Mission of Santa Clara, in the Department of Californias. The Junta has no hesitation in recommending said petition to your Excellency, for being persuaded of the great importance of the enterprise, it considers it entitled to all the protection of the Supreme Government, and also the particular circumstances of that department, and the just desire which his Excellency the President, has shown to preserve the integrity of the national territory, render it worthy of the greatest consideration. The Junta is consequently of opinion, that there should be immediately furnished to Señor Castil-

lero the sum of five thousand dollars, in the terms he proposes; that it should be authorized to furnish him with the iron retorts and flasks belonging to it, and the other thousand dollars, which can be employed in the construction of retorts, cylinders, and other small apparatus of distillation for said mine; although the law authorizing the Junta to make loans for the encouragement of deposits of quicksilver, exacts a premium of five per cent. per annum on the capital loaned, it cannot be doubted that the proposal of Señor Castillero to pay the five thousand dollars with fifty quintals of quicksilver, placed in Mazatlan, at the disposition of the Junta, at the rate of one hundred dollars each, and in the term of six months, offers greater advantages to the fund than the said interest. The urgency shown by Señor Castillero to undertake his journey to that Department, and that which his so doing may contribute, under present circumstances towards the preservation of the national territory, is, in the opinion of the Junta, a sufficient motive to leave, until a more opportune occasion, the formation of a contract of partnership, or of "avio" for the encouragement of said mine. It remains, then, to show to your Excellency that although the possession given to Señor Castillero, by the local authorities of California, has not been in conformity with the ordinance, inasmuch as there have been granted him "pertenencias" to the extent of three thousand varas, which are equivalent to fifteen "pertenencias," agreeably to the second article of the eighth title; yet it is necessary to consider that he has in his favor the qualification of being discoverer *of an absolutely new hill, in which there was no mine open*, and to such there is granted in the first article of the sixth title, *three "pertenencias," either continuous or interrupted; and if he shall have discovered other veins, one ("pertenencia") in each of them.* He has also in his favor the circumstance that he works it in company with others, to whom there is granted that without prejudice to the right which they may have by the title of discoverers, when they are such, they may denounce four new pertenencias, even though they are contiguous, and in the same direction; but that which is most worthy of consideration is that Californias being a frontier department, and frequently threatened by the emigrants from the United States of the North, and by the new colonists of Oregon, it seems proper to grant to the first mine discovered in a department so extensive, a greater number of "pertenencias," which view is corrobarated by the reason found at the end of the eighth title, article first, which says: "Considering that the limits established in the mines of these kingdoms, to which those of New Spain have, until now, been made to conform, are very contracted in proportion to the multitude, abundance and richness of the metallic veins which the goodness of the Creator has been pleased to grant

to those regions, I order and command, that in mines which may hereafter be discovered in a new vein, or without neighbors, these measurements be observed. Second—Along the thread, direction, or course of the vein, be it of gold, silver, or any other metal, I grant to every miner, without distinction of the discoverers, (who have their reward already assigned to them,) two hundred Castilian varas, called 'varas de medir,' measured on a level." Lastly, in the first article, eleventh title, there are expressed these terms: "And because the capital of a single individual may not be sufficient for great undertakings, while that of all the partners may be, I will and command that such companies be encouraged, promoted, and protected by all convenient measures, my Viceroy granting to those who may form such, every favor, aid, and exemption which can be granted them according to the judgment and discretion of the Royal Tribunal of Mines, and without detriment to the public, and my royal treasury." In reference to the ownership of two square leagues, which Señor Castillero solicits as a colonist, upon the surface of his mining property, for the purpose of supplying himself with the firewood necessary for the reduction of ores, (beneficio,) the Junta not having the necessary information on the matter, of which the Supreme Government has abundance, his Excellency the President will decide, as he may think proper. In this view the Junta, in sending up to your Excellency the petition of Señor Castillero, has no hesitation in recommending it very efficaciously, on account of the vital importance of the undertaking, and its incredible influence upon the general good and prosperity of the Republic. The Junta has the honor, on this occasion, to repeat to your Excellency the assurance of its distinguished esteem and consideration.

God and Liberty. Mexico, May 14th, 1846.

VICENTE SEGURA.

To His Excellency, the Minister of Justice and Public Instruction.

Twelfth. The resolution of the Government on the matter presented to it by the foregoing communication, and the proposals of Castillero which it inclosed, is expressed in four several writings:

1. In the *acuerdo*, or decree, written on the margin of the letter from the Junta de Fomento, in these words:

"May 20th, 1846. Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations, for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition."

To this *acuerdo* is affixed the rubric of the Minister of Justice.

2. This *acuerdo* is recorded in a book kept in the Ministry of Justice, where the substance of communications to the Ministry were noted, and a record made of the resolution of the Government on the matters to which they refer.

3. The action of the Government on Castillero's proposals, was communicated by the Minister of Justice to the Junta de Fomento, on the twentieth of May, 1846, in the following terms:

MINISTRY OF JUSTICE AND PUBLIC INSTRUCTION.

Most Excellent Sir:—Having reported to His Excellency, the President *ad interim* of the Republic, your Excellency's note of the fourteenth inst., with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California: His Excellency has been pleased to approve, in all its parts, the agreement made with that individual, in order to commence the working of said mine, and on this day the corresponding communication is made to the Minister of Exterior Relations and Government, to issue the proper orders respecting that which is contained in the eighth proposition for the grant of lands in that Department.

I repeat to your Excellency the assurance of my esteem.

God and Liberty. Mexico, twentieth of May, 1846.

BECERRA.

To His Excellency, D. VICENTE SEGURA, President of the Junta for the Encouragement of Mining.

4. In the communication from Castillo Lanzas, Minister of Relations, to the Governor of the Department of Californias, which is the two league grant set up by the claimant.

Thirteenth. The communication from the Minister of Justice to the Minister of Relations referred to in the foregoing, is as follows:

MINISTRY OF JUSTICE AND PUBLIC INSTRUCTION.

May 23d, 1846. Issue the orders referred to in the communication. [Rubric of Castillo Lanzas.]

I this day say to His Excellency, Don Vicente Segura, President of the Junta for the Encouragement of Mining, what follows:

"Most Excellent Sir:—Having reported to His Excellency, the President *ad interim*, your Excellency's note of the fourteenth inst., with which you were pleased to transmit, with

a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California, His Excellency has been pleased to approve, in all its parts, the agreement made with that individual, in order to commence the working of said mine, and on this day the corresponding communication has been made to the Minister of Exterior Relations and Government, to issue the proper orders respecting that which is contained in the eighth proposition for the grant of lands in that Department."

And I have the honor to transcribe it to your Excellency, to the end that, with respect to the petition of Señor Castillero, to which His Excellency, the President *ad interim*, has thought proper to accede, that there be granted to him as a colonist two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding.

I repeat to your Excellency the assurances of my consideration and esteem.

God and Liberty. Mexico, May 20th, 1846.

BECERRA.

To His Excellency the Minister of Exterior Relations.

Fourteenth, and last. In obedience to the orders of the President contained in the foregoing communication, Castillo y Lanzas, Minister of Relations, on the 23d May, 1846, addressed the following communication to the Governor of the Department of Californias:

MINISTRY OF EXTERIOR RELATIONS, GOVERNMENT AND POLICE.

Most Excellent Sir:—His Excellency, the Illustrious Minister of Justice, in an official communication of the twentieth instant, says to me that which I copy:

"Excellent Sir:—I to-day say to His Excellency, Don Vicente Segura, President of the Junta for the Encouragement of Mining, that which follows:

'Most Excellent Sir:—Having reported to His Excellency, the President *ad interim*, the note of your Excellency of the fourteenth instant, with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California; His Excellency has been pleased to approve, in all its parts, the agreement made with that person to commence the exploration of that mine, and on this date the corresponding communication is made to the Ministry of Exterior Relations and Government, that it may issue the proper

orders relative to what is contained in the eighth proposition, with respect to the granting of lands in that Department.'

"And I have the honor to inclose it to your Excellency, to the end that, with respect to the petition of Señor Castillero, to which His Excellency, the President *ad interim*, has thought proper to accede, that as a colonist there be granted to him two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding.

"I repeat to your Excellency, &c."

Wherefore I transcribe it to your Excellency, in order that, in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two square leagues which are mentioned.

God and Liberty. Mexico, May 23d, 1846.

CASTILLO LANZAS.

To His Excellency the Governor of the Department of Californias.

The foregoing decree was delivered to Castillero, and by him presented with his other proofs to the Board of Land Commissioners, in support of his claim to two square leagues, and to the mine.

Nature of the Claims and Division of the Subject.

On the foregoing documents the claimant bases his title to three pieces of property:

First. To the mine, consisting of seven pertenencias.

Second. To an additional mining possession, six thousand varas square, whose sides lie north and south, and east and west, in the middle of the area whereof is the original mouth of the mine.

Third. To two square leagues of land (by title in colonization) located in a square form over the mining possession; its sides lying north and south, and east and west, respectively, and in the middle of the area whereof is the original mouth of the mine.

The mine and mining possession are claimed by virtue of the discovery and registry, by Castillero, in November and December, 1845; and by the juridical possession of the mine, and the grant of three thousand varas in all directions from its mouth, given and made to Castillero by the Alcalde Pico, on the thirtieth of December, 1845; and by the confirmation of all the said acts of the Alcalde, by the Supreme Government of Mexico, on the twentieth of May, 1846.

The two square leagues in colonization are claimed by grant from the Supreme Government, evidence whereof is found in the marginal *acuerdo*, or decree, written and signed by the Minister of Justice on the letter of the Junta de Fomenta of the fourteenth of May, 1846; in the record of that *acuerdo* in the proper book; in the communication from the Minister of Justice to the Junta de Fomento of the twentieth of May, 1846; in the communication from the same minister on the same day to the Minister of Relations; and in the dispatch or decree of the Minister of Relations of the twenty-third of May, 1846, addressed to the Governor of the Department of Californias, setting forth that the President had granted said two square leagues to Castillero, and directing the Governor to put him in possession of them.

The United States dispute the genuineness of all these documents, and contend that they are forged, fabricated, fraudulent, simulated, antedated, null, void and of no effect. I use the Government's vocabulary.

This charge affects equally the mining claims, and the colonization grant.

To refute it, will involve a discussion of all the facts in the case, as well those which concern the mining claims, as those which relate to the colonization grant.

My argument on the facts will therefore embrace all the claims.

The discussion of the law applicable to the facts of the case, requires a division of the subject in two parts: the first, relating to the mining claims; and the second, to the two-league grant.

Part I.—The Mining Claims.

I shall treat this subject in the following order:

In the first place, it will be necessary to consider whether this Court has jurisdiction, under the Act of third of March, 1851, over a right or title to a mine derived from the Mexican Government in California.

That point determined, I shall proceed to discuss the mining claims under two heads:—The *first* embracing the discovery and the registry by Castillero, and the juridical possession and mining grant by the Alcalde Pico; and generally all that was done in the premises by the local authorities in California: the *second*, the acts of the Supreme Government, in confirming Castillero's mining claims.

First Head.—*The legal effect of the discovery and registry by Castillero, and of the juridical possession and mining grant by Alcalde Pico.*

Under this head I shall discuss:

Section 1. The nature and legal effect of discovery and registry in conferring title.

Sec. 2. The regularity of Castillero's and the Alcalde's proceedings in registry.

Sec. 3. The jurisdiction of Alcalde Pico, in matters of registry.

SECOND HEAD.—*The effect of the acts of the Supreme Government in confirming those of the Alcalde.*

Under this head I shall show, that by the ordinances of 1783, and by the laws, decrees, usage, and custom of the Mexican Government, two kinds of mining grants were authorized; ordinary, and extraordinary or special.

SECTION 1. Ordinary grants, of the dimensions fixed by law. These were made by Courts of general jurisdiction, or by special tribunals invested with that power.

SEC. 2. Extraordinary or special grants. These were made according to the special circumstances of each case, by the administrative branch of the Government, represented in New Spain by the Viceroy, and in Mexico by the Supreme Executive power.

PART II.—THE TWO-LEAGUE COLONIZATION GRANT.

In discussing the validity of this grant, I shall consider it in these two points of view:

SECTION 1. Whether the words of the grant are apt to convey title.

SEC. 2. Whether the President of Mexico had authority to make such a grant, either by virtue of the Colonization Law of 1824, or by virtue of the extrardinary powers possessed by Paredes at the date of the grant.

The extraordinary powers of President Paredes have an equal bearing on the validity of his confirmation of the mining possession, as well as on that of the two-league grant.

The whole of the discussion to which this forecast of my argument refers, will be directed to the mining and colonization grants, as perfect legal titles. I shall conclude by showing that they are entitled to confirmation, even under the supposition that they are inchoate or equitable titles.

THE FACTS.

Pursuing this course of argument, I will now enter upon the task of setting forth the evidence. In doing so, I shall pass in review the leading facts, with as much regard to the sequence of dates, as a proper system of investigation will permit.

I shall then set forth the untiring efforts of the claimant to have a full investigation of the facts of this case, made in the City of Mexico, where they occurred in the course of an important public business transaction between Castillero and the Government. How these efforts failed before this Court, from its adjudged want of power to issue commissions to foreign countries to take the depositions of witnesses in cases arising under the Act of third of March, 1851. How they failed before Congress through the interference of the Attorney General. How they failed with the President from the same cause. In one word, I shall show that while the Government was availing itself of the testimony which Henry Laurencel and James Eldridge bought up from time to time from James Alexander Forbes, and Robert Birnie, and Benito Diaz, to establish their own claim by defeating ours, the Attorney General of the United States obstinately and successfully resisted all the efforts of the claimant to have a full and fair investigation of the facts.

Any person familiar with the conduct of this case, and with the principles of construction that have been applied to the evidence, will be struck by the remarkable fact, that the claimant has been required, not only to prove positively that his title papers are genuine, but to rebut by evidence every extravagant hypothesis and wild conceit suggested by counsel who support the negative.

Talking of those who denied the truth of Christianity, Dr. Johnson said: "It is always easy to be on the negative side. If a man were now to deny that there is salt upon the table, you could not reduce him to an absurdity. Come, let us try this a little further. I deny that Canada is taken, and I can support my denial by pretty good arguments. The French are a much more numerous people than we; and it is not likely they would allow us to take it. 'But the Ministry have assured us, in all the formality of the Gazette, that it is taken.' Very true. But the Ministry have put us to an

enormous expense by the war in America, and it is their interest to persuade us that we have got something for our money. 'But the fact is confirmed by thousands of men who were at the taking of it.' Ay, but these men have still more interest in deceiving us. They don't want that you should think the French have beat them, but that they have beat the French. Now suppose you should go over and find that it really is taken, that would only satisfy yourself; for when you come home we will not believe you. We will say, you have been bribed. Yet, sir, notwithstanding all these plausible objections, we have no doubt that Canada is really ours." 1 Boswell's Johnson, 335: Boston edition, 1807.

The imaginary controversialist whom Dr. Johnson summoned to the dinner table, has his counterpart in the person of the Government's special counsel in this case.

This must be my excuse for whatever in my argument on the facts may appear too elaborate or minute.

PART FIRST.

FROM THE DISCOVERY OF THE MINE, IN NOVEMBER, 1845, UNTIL IT CAME INTO THE POSSESSION OF JAMES ALEXANDER FORBES, ABOUT SEPTEMBER, 1846.

I. In the month of October, 1845, Andrés Castillero, in company with General Castro, started from Monterey to visit General M. G. Vallejo, Commandant of the Frontiers of the North, who resided at Sonoma, and also Captain Sutter, at his establishment of New Helvetia. In company with them were several of their countrymen. They traveled with an escort of fifteen or twenty soldiers. Castro was Commandant-General of California; Castillero was Captain of permanent cavalry in the Mexican army, and a Commissioner from the Central Government to the Department of California, charged with public business.

Their common purpose in visiting General Vallejo was to concert measures for the defense of California. Castillero had the further object of endeavoring to purchase from Captain Sutter his Fort, and the entire establishment of New Helvetia, for the Mexican Government.

Their road lay through San José, Santa Clara, Yerba Buena, Sonoma, to Sutter's Fort. While traveling from Monterey to Santa Clara, Castillero, who had some knowledge of chemistry and mineralogy, delayed his party by looking for minerals in the hills on either side the road. When they came near Santa Clara, Gen. Castro, who was a native of California, remembering to have heard from his childhood of a mineral deposit near by, the nature of which had remained unknown, told Castillero of it, and suggested that he

might visit the spot then, or wait until their return from Sutter's Fort. Castillero preferred to examine the mineral forthwith.

"In consequence of this," says Castro [*Transcript*, 2613] "immediately on our arrival at Santa Clara, Castillero took a little cart and went to the mine (which had been called Chaboya's mine). He got out some minerals and made an assay. He found a little gold and silver, and a very small quantity of quicksilver; but he considered this latter of no importance, there was so little of it. We then continued our journey to Sonoma and Sutter's Fort, as I have stated."

"In the early days of November, 1845," this party, says General Vallejo, [*Transcript* 2597] reached Sonoma. "Castillero's business with me was political and military. He was there on his way to Sutter's Fort, whither he went accompanied by General Castro, Colonel Prudon, Mr. Leese, and the officers of whom I have spoken. His object in going to Sutter's Fort was to purchase the establishment of Sutter's Fort for the Mexican Government. While he was in Sonoma on that occasion, he stood godfather for my son Uladislao, who was baptized on the sixth November, 1845. I have with me a certificate of his baptism, which is signed by the priest, and also by General Castro and Victor Prudon, as witnesses. This certificate is dated seventh November, 1845.

"Mr. John Bidwell, who in the year 1845 was Captain Sutter's secretary and book-keeper, kept a journal, in which were noted the principal arrivals and departures, and other matters of interest occurring at the Fort. The entry for the eleventh November is as follows: "Tuesday, eleventh November, 1845. Arrived, José Castro, Prudhon, Leese, and Mexican Commissioner, (meaning Castillero) with an escort of about fifteen men. Fired a salute of seven cannon."—*Transcript*, 2642.

Mr. Jacob P. Leese joined the party at Sonoma, and accompanied them to Sutter's Fort as interpreter. In his deposition, [*Transcript*, 1103] he says: "I left Sonoma with them to visit Sutter's establishment, which was called New Helvetia. Mr. Castillero informed me that the Mexican Government, having become jealous of Sutter's establishment on the frontier, had directed him, Castillero, to endeavor to purchase out Sutter's establishment for the Mexican Government. The object of General Castro, on this

visit, was to induce the foreigners to come down nearer the settlements, offering them lands if they would do so. I acted as interpreter between Captain Sutter, General Castro, and Castillero. The negotiations failed, because Castillero insisted, as a condition of the purchase by the Mexican Government, that Captain Sutter should leave the country, to which he would not consent, though he was willing to sell. Another difficulty in the way was, that Castillero offered to pay in drafts on Mazatlan and Mexico, having no cash, while Sutter insisted on receiving the price in cash. I understood from Castillero that the Mexican Government was desirous of breaking up Sutter's establishment in the north, on account of its consisting almost entirely of foreigners. * * We had only one interview with Sutter, and that was on the evening of our arrival. On the next morning, after General Castro had made a speech to the foreigners, explaining the object of his visit, as I have stated it, he and Castillero left the Fort on their return to Santa Clara, by way of the Cosumnes River. I remained at the Fort all that day, and left the next morning for Sonoma by the route we had taken to the Fort."

The departure of Castro and his party from Sutter's Fort on Wednesday, twelfth November, 1845, is noted in Bidwell's journal. See his Depo. ans. 6, *Trans.* 2642.

"On our return to Santa Clara," says General Castro, "Castillero made further assays (of the mineral). He remained at Santa Clara, and I went on to Monterey. It was then that Castillero discovered the large quantities of quicksilver. He denounced the mine as a quicksilver mine, and established a company to work it, of which I was a member, having four shares in the mine."—Depo. ans. 7, *Trans.* 2612.

It would appear from the articles of partnership, which are dated second November, 1845, that the company was formed before Castillero and his party left Santa Clara for Sonoma and Sutter's Fort. By these articles of partnership Castillero reserving one half the mine for himself, distributed the other half equally between the following persons: first, General Castro; second, the Robles brothers; and third, Padre Real.—*Trans.* 314, 799.

II. Some days after Castillero's return to Santa Clara, to wit,

on the twenty-second November, 1845, he represented his discovery to the Alcalde Antonio Maria Pico, and, describing the mine as containing silver with a *ley* of gold, prayed that possession of it might be delivered to him.—*Trans.* 312, 795.

A few days after Mr. Leese returned from Sutter's Fort to Sonoma, which must have been on the fourteenth or fifteenth of November, 1845, he went on business to the neighborhood of the *Pueblo* of San José, from which the Mission of Santa Clara is only three miles distant. "About the latter part of November or first of December, 1845," to let Mr. Leese relate the history in his own words: "I went into the Mission of Santa Clara to dine with Padre Real of the Mission. Mr. Castillero was there. Our general conversation through dinner was about this mine, and of the experiments which Castillero had been trying to find out what the mineral was. He made a remark, and said he thought he knew what it was; if it was what he supposed it was he had made his fortune. We were anxious to know what it was. He got up from the table and ordered a servant to pulverize a portion of this ore. After it was pulverized, he ordered the servant to bring in a hollow tile full of lighted coals. He took some of the powdered ore and threw it on the coals. After it got perfectly hot he took a tumbler of water and sprinkled it on the coals with his fingers. He then emptied the tumbler and put it over the coals upside down, then took the tumbler off and went to the light to look at it; then made the remark that it was what he supposed it was—quicksilver. He showed all who were there the tumbler, and found that it was frosted with minute globules of the metal, which Castillero collected with his finger, and said it was quicksilver. He then said, to-morrow he would test it thoroughly and find out what it was worth. He considered it very rich, on account of the weight of the ore; and if it proved as rich as the quicksilver mines in Spain, that the Mexican Government had offered to any one for the discovery of such a mine, in the Republic of Mexico, one hundred thousand dollars."—*Trans.* 1102.

This discovery Castillero immediately communicated to his *compadre*, General Vallejo, in a letter dated Santa Clara, December 2, 1845, in which he says: "While awaiting the time for my departure for the interior of the Republic, I have employed myself as

a miner at a place five leagues from here, on the lands of the retired sergeant Don José Reyes Berreyesa, and with good prospects, having extracted from one same vein quicksilver, silver and gold in surpassing quantities; and I believe that five or six mines of the same kind will be discovered. I send you three assays; the largest of an ounce of ore, the second of three-quarters, and the smallest of half an ounce of ore, all picked."—*Vallejo's Dep. ans.* 5, *and Exhibit No.* 1. *Trans.* 2597, 2603.

As soon as the discovery of the remarkable richness of the ore in quicksilver was made, to wit, on the third of December, 1845, Castillero made the fact known to the Alcalde in a written communication of that date, and requested that this second representation might be added to the first.—*Trans.* 312, 795.

These two representations of the twenty-second of November and third of December, 1845, constitute what is known in the Spanish and Mexican laws as the Registry of the Mine, which is the fundamental title of the mine.

On the tenth of December, 1845, Castillero addressed a letter to Governor Pio Pico, informing him of the discovery and denouncement of the mine, and sent him at the same time samples of the quicksilver. The original letter, and these samples, were sent by the Governor to the Minister of Relations of Mexico, through the hands of Mr. Covarrubias.—*Trans.* 1805, 2606, 2232.

On the fifteenth of December, 1845, Castillero addressed another letter to the Governor, conveying the same information. The original letter is in the Government archives.—*Trans.* 2552.

On the twenty-first of December, 1845, Castillero, in a letter of that date to General Vallejo, informs him that "from twenty *arrobas* of ore we have extracted thirty pounds of quicksilver; and I estimate the yield is one *quintal* (one hundred pounds) per day." —*Trans.* 2598, 2604.

On the thirtieth of December, 1845, Manuel Castro, Prefect of the Second District, advises the Governor of Castillero's discovery, and that he is working the mine. Castro's original letter is in the archives, and, also, a copy of the Governor's reply.—*Trans.* 2546, 2582.

III. Immediately after the discovery and registry of the mine,

Castillero proceeded to open the vein, and employed a superintendent and laborers to dig the pit—called the *pozo de posesion*—preparatory to the act of the Alcalde in giving possession. For this purpose he employed Mr. William G. Chard, a native of Columbia county, New York, and at this day one of the worthiest and most prosperous citizens of California.

Mr. Chard says: "I was employed in and about the mine in 1845. I was employed first by Mr. Castillero, and the priest Don José Maria Real. I went up there to open the mine. I forget exactly the time of the year it was; I hardly know whether it was in November or December, 1845; I think it was in one of those two months."—*Trans.* 1069.

"First, Mr. Castillero employed me; after him, Padre Real; and after him, James Alexander Forbes." [*Cross-examination, Trans.* 1071.] "We had a shanty-house built of brush (while living in the mountains); it was the wet season before we got away from there, and I believe it rained some before I went there." [*Direct exam. res., Trans.* 1079.] When living on the hill he "(Castillero) was coming and going. The longest time he staid there at one time was six or eight days."—*Direct exam. res., Trans.* 1083.

Whilst Mr. Chard was living up at the mine, and before he went down to the creek where the reducing establishment was built, quicksilver was extracted in gun-barrels. "We formed a little furnance in the bank, and charged the gun-barrels with ore and put them over the furnace, stopped the touch hole, the muzzle dipped into a pan or bucket, or something else—there were three or four gun-barrels—made a fire under and over the gun-barrels. I think we were working with gun-barrels at the time they gave possession. I think we continued working with gun-barrels after the possession for a little, but not much. It was a slow process—could not use gun-barrels after they would get corroded—would get from one-half to one ounce of quicksilver out of each barrel. I think that was all we got out, (prior to possession) except a little gotten out at the Mission in the same way. Got the ore out of the cave. Don't recollect from what part of the cave. The Indians got it out. The cave was red with it. I directed the Indians in taking out the ore when Castillero was not there."—*Cross-exam. res., Trans.* 1082.

In answer to the question by the counsel for the Government, as to the time when these experiments with the gun-barrel were made, whether before or after they came up to the mine to give possession, Mr. Chard says: "This was the first thing we did after we went up there, before the giving of possession of the mine."—*Cross-exam.*, *Trans.* 1978.

This witness also states that he remembers when the possession of the mine was given; that it must have been December, 1845, or January, 1846—cannot positively state which. "Pico was there—his name is Antonio, I think. I forget whether he was Alcalde or not. Suñol was there, and Noriega. I know them all, but cannot think of their names. Berreyesa was there—the old man Berreyesa, who got killed in the time of the war, over in Sonoma. Do not remember the names of the others." Do you remember whether José Fernandez was there? "Yes, he was—he used to live on the creek, on the road to Santa Cruz."—*Trans.* 1069.

Mr. Chard does not recollect to have seen Castillero on the ground at the time possession was given; but this is not surprising, for, as the witness says, Castillero was coming and going all the time he lived up at the mine, and on one visit staid there as much as six or eight days. After the lapse of thirteen years, it is natural that a witness, whose memory is not very good, should remember only such persons present at the possession as he was not accustomed to see there frequently.

On the thirtieth of December, 1845, Alcalde Pico gave Castillero juridical possession of the mine, and also granted him 3000 varas in all directions from the mouth of the mine. The assisting witnesses were Antonio Suñol and José Noriega.—See their depositions, *Trans.* 23, 2803; 25, 2718; also deposition of José Fernandez, who was present.—*Trans.* 599.

Mr. Chard remained at the mine three or four weeks after the possession was given, and then removed down to the creek, where he built a log-house, a blacksmith-shop, and a furnace.—*Direct exam. res.*, *Trans* 1080.

Mr. Chard's account of his operations at the mine and *hacienda*, or reducing establishment, must be interrupted at this place to make room for a relation of Gen. Fremont's visit to the mine, on or about the twenty-second of January, 1846.

Gen. Fremont, who was at the time a Captain in the Topographical Engineers, conducted a survey under the orders of his Bureau, the immediate object of which was to ascertain the most direct route across the continent. With the report of this survey our country and the whole scientific world is familiar.

Gen. Fremont's character places his testimony beyond the reach of suspicion and calumny. I presume the Government's counsel will make no assault on it:

On or about the tenth day of December, 1845, we reached Sutter's Fort. I remained there about four days. On the fourteenth of the same month I left the fort and traveled to the head waters of King's River, with the object of meeting the main body of my party, which I had left at Walker's Lake. Returning, I reached Sutter's Fort on the fifteenth of January, 1846. I remained there four days, and on the nineteenth left the Embarcadero (now Sacramento City) in Capt. Sutter's launch, accompanied by eight of my party, for Yerba Buena, now the city of San Francisco, where we arrived in the course of a day or two. If my memory serves me, we reached San Francisco on the twentieth. As the river was high at that time, we had the advantage of the current, and so made a quick passage.

Capt. William A. Leidesdorff and Capt. William Hinckley were the principal acquaintances I made in Yerba Buena. I was there but a short time. I became quite well acquainted with Captains Leidesdorff and Hinckley.

About that time I visited the Pueblo of San José with Capt. Hinckley. I had arranged with Capt. Leidesdorff to go with him to Monterey, and having a day or two of leisure before he could be ready, Capt. Hinckley offered to go with me to see the quicksilver mines near San José, which Captains Leidesdorff and Hinckley had mentioned to me as an object of interest, and as having been recently discovered. I left Yerba Buena on or about the twenty-first of of January, 1846, at one o'cock, P. M., in a whale-boat. We reached the Embarcadero, now Alviso, about day-break the next morning. There we procured horses, and passing through San José, reached the mine on the same day. These dates are as nearly accurate as I can make them.

I think no one went with me to the mine but Hinckley. We arrived there, I should think, about noon. At the mine Captain Hinckley introduced me to Mr. Castillero, the owner of the mine, who showed me about—showed me the excavation from whence he had taken the ore—and gave me two or three specimens of the ore, some of which I brought away.

Before visiting the mine, Capt. Leidesdorff and myself had some conversation together with regard to purchasing the mine. When there, I spoke slightly with Castillero on the subject, and Mr. Hinckley also said something to him at greater length, tending to the same end, but Castillero was not at all disposed to converse about selling. At this time, I think, Castillero was engaged in building a house below in the valley, to be used for the occupation of himself or workmen. He also went through the process, roughly, of extracting the quicksilver from the ore, by putting some on red-hot iron and collecting the fumes in a cup. We remained there perhaps some two hours.

Ques. 9. As I presume about that time you were a stranger to the Spanish laws on the subject of mining, perhaps your curiosity was excited to learn something on that subject: you will please to state whether you received any information as to the mode in which titles to mines were then acquired, and what, if any, steps had been taken by Castillero in acquiring the ownership of his mine.

Ans. I learned from Castillero that he held the mine under a denouncement. I then, for the first time, became acquainted with the Spanish system of acquiring mines by denouncement. Whether I learned this in answer to questions propounded by me to Castillero, or whether he volunteered the statement, I do not now remember. The impression distinctly and strongly remained upon my mind, as a piece of knowledge acquired at that time, and which I afterwards made use of in this State during my operations in 1849.

The discovery of gold in the rock was first made in 1849, on my Mariposa tract; it was considered that that discovery was the first of the kind in California. In the uncertainty respecting titles in California which then existed, I denounced the mine before Judge Geary in San Francisco; before Alcalde May in San José, and before the Alcalde in Stockton, whose name I do not remember. That vein is now known as the old Mariposa, or Fremont vein, near the town of Mariposa. I made these denouncements entirely upon the information which I derived, at the time spoken of, from Castillero. When I left California, in 1847, the gold placers had not been discovered; I heard of it as I was leaving the western frontier of the United States, in 1848, to return to California, where I arrived in the spring of 1849.

Ques. 10. When did you return from the mine to Yerba Buena; how long did you remain, and where did you go to from there?

Ans. I returned directly from the mine to Yerba Buena, which place I left about sundown of the twenty-fourth of January, 1846, in company with Capt. Leidesdorff and Capt. Hinckley—remained that night at Sanchez Ranch. In the morning Capt. Hinckley returned to Yerba Buena, and Capt. Leidesdorff and myself con-

tinued our journey to San José, where we stopped for the night at Suñol's house. The next night we spent with Mr. Gomez, in the Cañada San Juan; and the day following, the twenty-seventh, we reached Mr. Larkin's house, at Monterey. I there called on Gen. Castro, and the Prefect Manuel Castro.

Ques. 11. After your visit to the mine, did you converse with Capt. Leidesdorff respecting the purchase of the mine?

Ans. I did. On the journey to Monterey I talked the subject over with him, but the amount required was larger than my means. At that time the mine was exceptional to any other kind of property; everything else—such as land, cattle, etc.—being very low, and of little exchangeable value; while the mine was considered as something of immense value, compared with other property. Thirty thousand dollars, which was the sum for which Leidesdorff supposed the mine might be purchased, was considered an immense sum of money in California in those days. This circumstance gave great prominence to the mine.

Ques. 12. Since January, 1846, have you ever been to the mine?

Ans. I think not. I have been in its neighborhood.

Ques. 13. What was the name of the mine in January, 1846; do you remember?

Ans. I do not remember that I heard it designated other than the Quicksilver Mine. I never at that time heard it called the Almaden, so far as I can recollect. This latter designation stands, in my mind, as one subsequently given.—*Transcript*, 2678.

We now resume Mr. Chard's testimony. This witness remained in the employment of the owners of the mine from the time he first went to open it, in November or December, 1845, until August or September, 1846. He was first employed at the mine itself, which is some thousand or twelve hundred feet above what he calls the creek. He went there to open the mine. He superintended the labors of the Indians. While so engaged, the possession of the mine was given. Three or four weeks after that event, he went down on the creek, where he constructed a simple reducing establishment.

During his stay here, he says: "I was building houses; I built a furnace and smelted the ore; got out some quicksilver, I should judge three or four tons of quicksilver in the pot; it was one of a whaler's try-pots. We burnt it out under try-pots; that is, we first made a well, and put at the bottom of it a trough full of water; then we had part of a copper still, which went down into the water

in the trough, and there were bars of iron laid across the mouth of the well, and the ore piled on top of them; made the pile the size of the pot, and covered it with the pot turned upside down; we then piled the wood on the top of and around the pot, set fire to the wood, and in that way we got out from three to four tons. The top of the copper still was attached and came up to the iron bars over the top of the well, and the vapor was forced through the pipe into the water by heat."—*Transcript*, 1070.

He testifies that, according to the best of his recollection, while he was at the mine and reducing establishment—that is to say, from December, 1845, to August, 1846—there were employed on an average, at both places, about ten or twelve men, principally Indians. Only one white man, besides himself, was employed,—a blacksmith, whom they used to call "Old Billy."—*Direct Exam. Trans.* 1069.

I have been thus particular in citing the testimony of Mr. Chard, because he is a witness upon whose statements perfect reliance may be placed; and for the further reason, that he gives us a history of the operations at the mine, from a period anterior to the act of possession, down to and beyond the military occupation of the northern part of California by the Americans.

IV. Castillero having thus discovered, registered and opened the mine, obtained juridical possession of it, and started its operations, (on a simple and small scale, it is true, yet in the only manner that the resources of California in those days would permit) embraced the first opportunity to make known his discovery to the Mexican Government. This occurred in the departure of the brig Hannah, on the seventh of March, 1846, from the port of Monterey for Mazatlan. She arrived in Monterey about the middle of February, 1846, as we may infer from Castillero's letter to General Vallejo, of the twenty-first of that month, by which the latter is informed that a brigantine-schooner had arrived, bringing communications from the Government to Castillero and General Castro. "This vessel," Castillero adds, "will sail shortly, and will carry communications of what has occurred lately. Myself or Piña will leave in it, or both together. I am only detained waiting the arrival of the division, which may reach here in a day or two. Tell me what commands you have for the capital, and I shall execute them

faithfully in person, or order Piña to do so, as the circumstances may be."—*Vallejo's Dep. ans.* 5, *Trans.* 2605.

In this letter Castillero informs Vallejo that the Republic is in perfect peace. In his letter of the eleventh of March, 1846, to General Vallejo, Castillero informs him that "Piña embarked on the fourth of this month, in Monterey, and was dispatched in perfect order. He will travel post to Mexico." [*Trans.* 2605]. Castillero wrote this letter in Santa Clara. The vessel (Hannah) had not, as he supposed, sailed on the fourth of March. Her departure was delayed at the instance of the American Consul at Monterey, Thomas O. Larkin, Esq., for several days, to enable Captain Fremont to send home his dispatches. The Hannah sailed from Monterey for Mazatlan on the seventh of March, 1846. [*See Vallejo's Dep. Trans.* 2605, *Exh. No.* 4; *Swasey's Dep. Trans.* 2659, *Exh. No.* 1; *F. Larkin's Dep. Trans.* 3018.] She arrived at Mazatlan April 1st, 1846.—*See Castillo y Lanzas' Dep. ans.* 687, *Trans.* 2353.

Concerning the person named Piña, of whom Castillero speaks, General Vallejo says: "He was Lieutenant (*Alferez*) of the Permanent Cavalry. He was for a long time Adjutant, and was a most excellent officer of artillery. I know that he left California in 1846, and never returned. I have heard and believe that he was killed at the battle of Cerro Gordo. His name was Lazaro Piña."—*Trans.* 2,599.

By this officer, who was under Castillero's orders, and who was dispatched by him to the Government, Castillero doubtless transmitted the letters written from the Mission of Santa Clara, on the nineteenth and twenty-second of February, 1846, to the ex-President Herrera; a copy of extracts from which, together with a copy of Castillero's letter to Don Tomas Ramon del Moral, dated Mission of Santa Clara, February nineteenth, 1846, were by the latter laid before the *Junta de Fomento de Mineria* on or about the twenty-first of April, 1846, giving them the first information of Castillero's discovery. The specimens of cinnabar furnished to the *Junta* at the same time by Señor Moral were also, beyond doubt, taken to Mexico by Sergeant Piña.

Castillero in a short time followed Piña to Mexico. He sailed from Monterey on the third of April, 1846, in the bark Don Quix-

ote, John Paty, master, under charter by the Mexican Government, and arrived at Acapulco on the twenty-first of that month. Castillero went to Mexico, where he must have arrived in the first days of May. The bark remained at Acapulco till the eighteenth of May, awaiting his return to that place; his intention, when he left there, being to come back in her to California.—*Paty's Dep. ans.* 4, 25; *Trans.* 424, 427.

Castillero's arrival in the capital had been preceded by the letters and specimens which he had sent by Piña. When he got there, he found that the *Junta de Fomento*, having on or about the twenty-first of April been put in possession of such parts of those letters as related to his important discovery, and of the specimens which accompanied them, had already caused the latter to be assayed by the Professor of Chemistry in the National College of Mexico, and ascertained their surprising richness; so that, when he reached the Capital, the Government fully appreciated the great value of the mineral deposit he had discovered. Accordingly, on the sixth of May, 1846, he presented himself in person before the *Junta de Fomento*, and made a verbal report concerning the mine, stating what aid he required from the Government to develop its resources. The *Junta*, at its session of that day, requested him to make his propositions in writing. This is shown by the following extracts from the minutes of the proceedings of the *Junta*, at their meeting on the sixth of May, 1846:

"*Session of sixth of May*, 1846. Present, the Señores Segura, Flores and Bassoco; and the minutes of the fourth having been read and approved," &c. * * * "Señor Don Andres Castillero appeared and made a verbal report regarding the discovery, denouncement and actual condition of the quicksilver mine, situated in the mineral district of Santa Clara, in Upper California, inviting the *Junta* to take shares in the company he has formed for working it, with other measures which he requests may be obtained from the Supreme Government for the furtherance of the enterprise. The *Junta* resolved that Señor Castillero should present his views in writing, that the *Junta*, taking them into consideration, may resolve what may be expedient."—[*Trans.* 1684.]

On the twelfth of May, he handed in to the *Junta* his propositions in the desired form. They consisted of nine articles. The

first six related to the advance of a small sum of money, and certain flasks, by the *Junta*. The seventh was, that the Supreme Government should approve the mining possession which had been given by the authorities in California. The eighth, that the Supreme Government should grant him, as a colonist, two square leagues of land on his mining possession.—*Trans.* 1890.

These propositions were transmitted by the *Junta de Fomento* to the Minister of Justice on the fourteenth of May, 1846, accompanied by a long communication of that date, in which the *Junta* recommended and strongly urged their approval by the Government. [Trans. 1708.] On the twentieth of May, 1846, the Minister of Justice, in an official communication, informed the *Junta de Fomento* that the President had approved Castillero's propositions in all their parts; and that, as regarded the grant of two leagues of land, the proper orders had been sent to the Minister of Relations. [*Trans.* 1792.] On the same day the Minister of Justice informed the Minister of Relations that the President had acceded to Castillero's petition for a grant of two leagues, and directed him to take the proper steps in the matter. [*Trans.* 1807.] On the twenty-third of May, 1846, the Minister of Relations addressed an official communication to the Governor of California, in which he copied the aforesaid letter from the Minister of Justice, and directed the Governor to put Castillero in possession of said two square leagues. [*Trans.* 65, 67, 2233.] This document was delivered to Castillero. When he received it, it was doubtless his intention to bring it to California, present it to the Governor, and claim the possession of the land to which it referred.

But the war intervened, and Castillero never returned to California.

When he departed from California in April, 1846, it seems that he left the mine in charge of Padre Real, one of his partners in the concern, under whom Mr. Chard continued its operations. Meantime, troubles thickened in California. The Americans, of whom—owing to their number and influence—the Mexican Government had been for some time jealous, conceived it necessary to concert measures for their common safety; and felt justified, on that ground, in pursuing the aggressive plan of declaring California independent of the Mexican Government. This was done in Sonoma early in June,

1846. The Bear flag was raised. Civil war existed. Several prominent Californians were made prisoners. I find in Bidwell's journal, under date of Tuesday, June 16th, 1846, the following curt entry: "Arrived, E. Merritt and Carson from Fremont's camp, with news of Sonoma being occupied by the Americans. Arrived in the evening, as prisoners, General Vallejo, Salvador Vallejo, Prudon, and Leese."

On the seventh of July, 1846, the American flag was hoisted at Monterey.

Three or four days after that event, Gen. José Castro, the Commandant-General of California, who was, as we have seen, one of the partners in the mine, left the Salinas plains, near Monterey, on his march to Los Angeles. He left Los Angeles on the tenth of August 1846, and, traveling through the Departments of Sonora and Sinaloa, reached the city of Tepic, in the Department of Jalisco, where he remained until the beginning of 1848. In February or March of that year, he returned to California. While in Tepic—that is to say, in the months of March, April and May, 1847—he sold his entire interest in the mine to Mr. Alexander Forbes.—*Castro's Dep.*, *Trans.* 151, 160, 2615.

Just before Monterey was taken by the American forces, Gen. Castro signed two papers relating to the mine. The first in the order of dates, a power of attorney to the Priest Eugene McNamara, authorizing him to contract with an English company for the *habilitacion* or working of the mine, dated Monterey, twelfth of June, 1846; the second, a petition to the Alcalde, Dolores Pacheco, of San José, dated twenty-seventh of June, 1846, on which is written a marginal decree, in the handwriting of Salvio Pacheco, brother of Dolores, signed by the latter, and dated the twenty-ninth of June, 1846. This petition will be noted more fully in another place.—*Castro's Dep.*, *ans.* 10, 30, 31, *Trans.* 2612.

The correspondence of the late Thomas O. Larkin, who in 1846 and for some years before was United States Consul at Monterey, frequently refers to the New Almaden mine, and gives many interesting particulars.

Mr. Larkin was a most painstaking and efficient representative of his Government on the Pacific coast. He was an excellent business man, and very careful in preserving his papers. He

retained copies of both private and official letters written by him, in a large well bound book. His Consular records were well kept. He died a few years ago, leaving a large fortune and a good name. I give extracts from his letters which refer to the mine.

"CONSULATE OF THE UNITED STATES OF AMERICA,
PORT OF MONTEREY, CAL., April 3d, 1846.

"Sir:—Don Andrés Castillero, formerly member of Congress from this department, leaves this port in a few days for Acapulco on board the Hawaiian barque 'Don Quixote,' as Commissioner to Mexico from General José Castro, military Commandant of California. He will arrive in Mexico by the twenty-fifth or thirtieth of this month.

"I am under the impression that the President of Mexico is to be informed from Don Andrés, or the correspondence he carries, that there is danger from an invasion of Americans (I am confident there is not) in this country; and to give some information relative to what they call driving Captain J. C. Fremont out of California. He is yet, I believe, surveying, or resting his horses in the interior."

* * * * * * *

"At the town of San José, eighty miles from Monterey, Don Andrés Castillero has discovered a quicksilver mine: the ore produces from fifteen to sixty per cent. I have seen him from an old gun barrel, in thirty minutes, run out about thirty per cent in pure quicksilver. This must be a great advantage to California."

To the Hon. Minister of Legation of the United States of America, City of Mexico.—*Trans.* 2667.

On the second May, 1846, Mr. Larkin writes to Captain J. B. Montgomery, U. S. ship Portsmouth, as follows:

"Five or six miles from the town of San José, and near the Mission of Santa Clara, *there are mountains of quicksilver ore, discovered in* 1845 *by Don Andrés Castillero of Mexico*, which I have twice seen produce twenty per cent of pure quicksilver," etc. * * "There appears no end to the production of metal from these mountains: working of quicksilver is but now commenced." —*Trans.* 2269.

On the fourth May, 1846, Mr. Larkin addressed a long letter to

Mr. Buchanan, then Secretary of State, on the mineral resources of California, in which he says of this mine:

"Five or six miles from the town of San José, and near the Mission of Santa Clara, there are mountains with veins of quicksilver ore, *discovered by Don Andres Castillero of Mexico, in* 1845, which the undersigned has twice seen produce twenty per cent of pure quicksilver," etc. * * "There appears no end to the production of the metal from these mountains: working of the quicksilver is but now commenced under great disadvantages, from not having any of the materials used in extracting that metal."

"By the laws and customs of Mexico respecting mining, every person or company, foreign or native, can present themselves to the nearest authorities and denounce any unworked mine; the authorities will then after the proper formalities put the denouncer in possession of a certain part of it," etc. * *

"Up to the present time there are few or no persons in California with sufficient energy and capital to carry on mining, although a Mexican officer, [meaning Castillero,] a Padre, [meaning Padre Real,] and a native of New York, [meaning Mr. Chard,] are on a very small scale, extracting quicksilver from the San José mine." [*Trans.* 2671 *and* 2657.] The last reference is to extracts from the letter certified by the State Department.

On the twenty-fourth of June, 1846, Mr. Larkin addressed a long letter to G. P. Judd, Esq., of Honolulu, Sandwich Islands, in which he gives an account of the discovery of the mine, and describes the mode of extracting the metal. This letter Mr. Judd enclosed for publication to the Editor of the *Polynesian*, a newspaper printed in Honolulu. It appeared on the twenty-fifth of July, 1846. The newspaper is in evidence. I give the following extract:

CONSULATE OF U. S. OF AMERICA,
Monterey, California, June 24th, 1846.

SIR:—

I have the pleasure of forwarding to you a specimen of California quicksilver ore, from a mine seventy miles north of Monterey, and ten miles from the pueblo of San José discovered in 1845, to have quicksilver in it. The place was well known for eighteen years, and supposed by the Californians to be a silver mine, they having in 1828, with some foreign quicksilver, extracted the other metal. In 1845 a Mexican, being in the vicinity, heard that the

mountain contained rock different from any other; he went to examine it, *and immediately denounced the place before the nearest Alcalde*, and then made known what it contained, &c.

To G. P. Judd, Minister of Finance, Honolulu, Oahu.

[*Trans.* 2223]—Newspaper proved. This number of the *Polynesian* will be found in the State Department, Washington. *Trans.* 2645, 2647, 3020.

IT THUS APPEARS THAT THE GOVERNMENT OF THE UNITED STATES BEFORE THE BEGINNING OF THE WAR WITH MEXICO, WAS FORMALLY NOTIFIED BY THEIR OWN CONSUL, OF THE DISCOVERY AND DENOUNCEMENT OF THIS MINE BY ANDRES CASTILLERO—AND THAT BY THE LAWS, USAGES AND CUSTOMS OF MEXICO, IT WAS HIS PRIVATE PROPERTY.

A few months after our Government received this information from their Consul, a report was read to the Mexican Congress by Señor Lafragua, Minister of Interior and Exterior Relations, in which Castillero's discovery was mentioned. On page sixty-five of his report, he says:

"In the State of San Luis Potosi the metals reduced and the quicksilver extracted are in proportion; and in Upper California a mine (*criadero*) has been discovered, whose yield surpasses that of the best mine known, that of Almaden, which does not produce more than thirteen per cent., while ours, by the assays made in the College of Mining of this Capital, exceeds thirty-five and a half per cent." * * * * * *

[Page 66.]

* * "I recommend the sovereign Congress to direct its attention to this subject, making the production of our quicksilver a truly national enterprise, the importance of which cannot be overrated, either by creating a fund, or dictating other suitable measures." *

As is usual in all reports by Cabinet Ministers, there was incorporated in this one of Mr. Lafragua's the various reports sent in to him by his subordinate officers, and among them that of the *Junta de Fomento y Administrativa de Mineria*, the Mining Bureau, to which, as we have seen, Castillero had applied for aid in May of the same year. The Junta in their report give the following account of their transactions with Castillero:

[Page 118.]

Number 52.

"SECRETARY'S OFFICE OF THE JUNTA DE FOMENTO Y ADMINISTRATIVA OF MINING.

"Most Excellent Sir:—In compliance with your Excellency's superior order of the third instant, directing this Junta to give you an account of the matters confided to its care since the time of its report in 1845, and of their present condition, with the object of having them in view when forming the *Memoria* which you are to present to the general Congress of the nation as soon as it shall be installed, the Junta has the honor to submit to your Excellency a simple historical relation of the management of the most important matters with which it has been occupied for the last two years, and their present situation, with the reflections and recommendations which it has deemed suitable for the better and more faithful performance of its duties."

[Page 136.]

* * "The Junta, on the twenty-first of April last, sent to the professional Board (Junta Facultativa) of the College some specimens of cinnabar, which Don Tomas Ramon del Moral presented in the name of Don Andres Castillero, a resident of Upper California, with a representation in which he asked for assistance to work a mine which he has discovered at the Mission of Santa Clara, known by the old Indians, who got out of it vermillion to paint their bodies. The assay having been made by the Professor of Chemistry, it resulted that the ores in common produced the extraordinary ley of thirty-five and a half per cent., which was communicated to the Government on the fifth of May, representing to it that Señor Castillero had been asked what assistance he required of the Junta.

"This Señor presented his petition in due form, and it having been very attentively examined by the Junta, he made his propositions, to which this (Junta) agreed, to wit: that there should then be delivered to him $5,000 in money, eight iron retorts, of those which the Junta ordered to be made for the examinations previously made, and all the quicksilver flasks it has in the negotiation of Tasco. Señor Castillero obligated himself, on his part, to repay said advance in quicksilver, at the rate of one hundred dollars a quintal, within six months from his leaving the port of Mazatlan. This agreement was approved by the Supreme Government on the twentieth of the same month; but on account of the declaration of the blockade made by the United States of the North, when he was about to receive the draft on Mazatlan, the Ministry issued the order of September 19th of this year, directing the suspension of all payments of the branch of quicksilver, except some for the support of the College and the expenses of the office." * *

[Page 146.]

* * "This is not the occasion to present together all the labors of the Junta, to correspond to the high confidence with which the Government has honored it. A part of them are expressed in this note, and the others may be found in the memorials, reports and multitude of communications which are in the Ministry. For the present it will merely assure what is shown in these documents, to wit: that the spirit of enterprise has been so stimulated that the quicksilver mines in the principal Departments of the Republic are being worked, both by companies and also by individuals; that in that of San Luis Potosi, the quicksilver extracted is in proportion to the silver reduced, so that no foreign quicksilver is required; that in Upper California, in the Presidio of Santa Rosa, there has been discovered by Señor Don Andres Castillero a great mine, the *leys* of which are truly surprising, since it results from the assays made in the College of Mining that the common fruits show a ley of over thirty-five and a half per cent., while that of the best mine which is known, that of Almaden, does not exceed thirteen per cent.; and finally, from all the data collected, it may be hoped, on good grounds that our mines of quicksilver are more than sufficient to supply all that is required for the reduction of our silver.

"This grand national enterprise the Junta has not been able to carry out, because it was deprived of one of its funds, of one per cent. of the circulation of money without substituting any other, and because of the remaining fund it could only dispose of one-third part, since the Government, in the distress of its treasury, has used the rest. The evil was increased to the lamentable extremity of leaving it (the Junta) without any, by the order of the tenth of May last, which directed the suspension of all the payments which were made by the public treasury. The sad results of such determinations the Junta will not stop to detail; they are manifest from what has already been here shown." * *

Mr. Lafragua's report was read to the General Congress on the fourteenth, fifteenth and sixteenth of December, 1846, and with the accompanying documents makes a very large volume. I have brought with me a copy of it for the use of the Court. Translations of the foregoing extracts will be found in the Trans. p. 3039, *et seq.* The Spanish on pages 3036, *et seq.* The book is proven by Mr. Lafragua himself. See his deposition, Answers 7–8, Trans. 17–18; also by Mr. Bassoco, Answers 114, *et seq.*, Trans. 1232; also by Mr. Castillo Lanzas, Answers 53–54, Trans. 2237–8; also by J. P. Benjamin, Trans. 3026.

PART SECOND.

From September, 1846, to the time that Robert Walkinshaw took Possession, in April, 1847.

I. About the time of the occupation of California by the American forces, and in consequence of that event, as the counsel for the Government contended with so much pertinacity, Padre Real turned over the possession of the mine and the control of its affairs to Mr. James Alex. Forbes, Her Britannic Majesty's Vice Consul for California, with a view to such protection as a guardianship so powerful might afford. Without stopping to contest the inferences of the Government's counsel, or to remove the prejudices which he has attempted to excite from them for the obstruction of the course of justice, I simply draw attention to the fact that, some time in July, August, or September, 1846, James Alexander Forbes came into possession of the mine as the agent of the owners, or of some of them. Shortly afterwards, Mr. Chard, the Superintendent, left the establishment and went North to live upon his rancho.

On the twenty-second of September, 1846, James Alexander Forbes gives Mr. Alexander Forbes, of Tepic, this information: "I am now in charge of the quicksilver mine, and I am going to work it until I can hear from Castillero, and I am on the point of striking a bargain for four shares." [*Trans.* 540, *Exh. O. H. X. No.* 2.] In his deposition, taken on behalf of the Government, Mr. J. A. Forbes says: "I received possession of the mine, in 1846, from the agent of Castillero, Padre Real." [*Trans.* 445.] At that time, "the aperture of the mine was an adit or horizontal entrance. The pit of possession (*pozo de posesion*) was filled with the debris

of the upper part, called *tepetate*. The adit was about twenty or twenty-five feet in length through the rock. The ores were in sight on either side. There was a *planilla*, or little plateau on the outside, formed of the material taken from the mine. There was one *mayor-domo* in charge, one blacksmith, and two or three Indians. The *mayor-domo* and blacksmith resided at the *hacienda*. One of the Indians remained constantly at the mine and slept in it. They were not at that time actively engaged in extracting ores." At the time Forbes took possession, he says he received about two thousand pounds of quicksilver. His first visit to the mine was about a month before he took possession of it; and then the *mayor-domo* was there, and some three or four Indians were at work inside the mine, extracting ores. Such was the condition of the mine in 1846.

It is perhaps worthy of remark, just here, that the first instance I have found of this mine being called "Almaden," occurs in a receipt from Mr. Chard to J. A. Forbes, dated October 16th, 1846, for the sum of fifty dollars, full value of one month's services "in the mine of Almaden of Santa Clara," *Trans.* 1083. In its original registry it was called the mine of Santa Clara.

Leaving the mine in the possession of Mr. J. A. Forbes, for the present, I will pursue the history of its fortunes elsewhere.

II. The first person outside of California, who acquired an interest in the mine, was Mr. Alexander Forbes, of Tepic. This gentleman is the author of a history of California, written in 1835, and published in London in 1839. It is said to be a book of considerable merit, and superior to any other work on the subject. This Mr. Forbes is a relative of Mr. William Forbes, formerly of Tepic, a member of the firm of Barron, Forbes & Co. At various times, between 1840 and 1850, he acted as British Consul at Tepic, in the absence of the late Mr. Eustace Barron, senior partner in the house of Barron, Forbes & Co. These circumstances brought him into correspondence with James Alexander Forbes, British Vice Consul in California, and led him to a knowledge of Castillero's discovery a very short time after it was made. As early as the thirtieth January, 1846, just one month after the *Alcalde* had given juridical possession of the mine to Castillero, J.

A. Forbes informed Mr. Eustace Barron that " Don Andrés Castillero, a sort of Commissioner from the Mexican Government, is now working a quick-silver mine near the Mission of Santa Clara, which has yielded forty per cent. upon the assay of the mineral employed." —*Trans. p.* 540. *Exh. O. H. X. No.* 7.

Mr. Alexander Forbes, it appears, duly appreciated the value of so important a discovery, and on the fifteenth April, 1846, wrote from Tepic to J. A. Forbes, by the Rev. Mr. McNamara, who was coming to California, requesting " as correct information as can be procured respecting the quicksilver mine or mines, lately said to be discovered in California, one of which you (J. A. F.) mention as being worked by Mr. Castillero."—*Trans. p.* 382. *Exh. O. H. No.* 16.

On the eleventh May, he again wrote to J. A. Forbes on the same subject. *Trans. ut supra.* And again, on the second September, 1846, he wrote from Tepic to the same person, thanking him for his offer to procure more information respecting the quicksilver mines, hoping that they may turn out to be valuable, and stating that any certain information about them will be interesting, as the mining establishment of Mexico must be greatly benefited by the abundance of quicksilver, which was then scarce and dear.—*Trans. p.* 382. *Exh. O. H. No.* 17.

The Rev. Eugene McNamara, who is mentioned in the letter of eleventh May, 1846, left California in June or July of that year, in the British man-of-war Collingwood, for the Sandwich Islands, whence he went to Mexico, and reached Tepic in November following Mr. McNamara, it will be remembered, carried with him a power-of-attorney from General Castro, authorizing him to contract with an English company for working the mine. As McNamara was the bearer of the letter from Alex. Forbes to J. A. Forbes, of the fifteenth April, 1846, in which information was requested concerning the quicksilver mine recently discovered, it is very natural that he and Mr. Forbes should have conversed on the subject before his departure for California. In all probability, it was his knowledge of Mr. Forbes' interest in the matter, acquired in that way, that induced him to endeavor to negotiate a contract of *habilitacion* with the latter in November, 1846, under the letter of attorney given him by General Castro. Be that as it may, a

contract of the kind was made between McNamara, as the agent of the mine owners, and Alex. Forbes, in Tepic, on the twenty-eighth November, 1846. In Spanish, it is called a contract of *avio* or *habilitacion*, and is substantially a lease of the mine for the term of sixteen years to Mr. Alexander Forbes, who undertook to work it during that time at his own expense and risk, and to pay the owners one-third part of its gross products.

As McNamara's power was derived solely from General Castro, who had no authority to appoint an attorney in fact for the other owners of the mine, it was apparent that he had no right to enter into the contract with Mr. Forbes, except so far as his constituent was concerned. It was therefore necessary to procure a ratification of the contract by the other owners. Just about this time Mr. Alexander Forbes was negotiating, through his friend and agent Don Francisco Martinez Negrete, of Guadalajara, then sojourning in the City of Mexico, where Castillero was residing, the purchase of some of his *barras*, or proprietary shares in the mine. On the twenty-fourth November, 1846, Mr. Alex. Forbes had written from Tepic to Mr. Negrete, in Mexico, requesting him to purchase for him some of Castillero's shares. This will appear from Mr. Negrete's reply of the fifth December, 1846.—*Negrete's Dep. Exh. No.* 4, *O. H.*, *Trans.* 2442.

But before the purchase was effected in Mexico, the contract of *avio* had been made in Tepic between Alexander Forbes and McNamara, and a copy of it received by Mr. Negrete, in Mexico, on the ninth December, 1846. Mr. Negrete, perceiving that McNamara had no power to act for any owner of the mine except General Castro, would not close matters with Castillero before McNamara's arrival in Mexico, hoping that Castillero might be induced to ratify the McNamara contract, and sell some of his shares at the same time, and thus settle the whole business at once. This appears from his letter of the ninth December, 1846.—*Negrete's Dep. Exh. No.* 5, *O. H.*, *Trans.* 2443.

On the twelfth December, 1846, McNamara arrived in Mexico, and on the sixteenth of that month, he and Castillero, and Mr. Negrete, and Señor Romero—a lawyer whom Mr. Negrete had employed in the affair—met together and concluded an agreement; the terms of which were, that Castillero would ratify the McNamara

contract of *avio;* lease to Mr. Alexander Forbes and company, for the term of sixteen years, the two square leagues around the mine, which the Supreme Government had given him; and sell to Mr. Forbes five *barras*, or five twenty-fourth parts of the mine, for four thousand dollars. This contract was duly executed next day (seventeenth December) in two public acts, before Nazario Fuentes, a Notary Public; the first instrument relating to the ratification of the contract of *avio*, and the lease of the two square leagues of land; and the second to the sale of the *barras*. In the contract of ratification, Castillero also undertook that his partners in California, who were the two Robles, owners of four *barras*, and Padre Real, the owner of the same number, should ratify and confirm the said contract. This, as we shall see, was done by J. A. Forbes, as the attorney-in-fact of the Robles, on the fourth May, 1847.—*Negrete's Dep. Exh.* 7, 8, 9, 10., *Trans.* 2445–2488, *for translations.*

The *testimonios* of these contracts were obtained from the Notary by Mr. Negrete, and sent to Mr. Alexander Forbes. Castillero's title to the two square leagues of land, derived from the Supreme Government, is copied in full in the instrument of ratification. The original document he delivered to Mr. Negrete, who sent it to Mr. Alexander Forbes in December, 1846.—*Negrete's Dep.*, *ans.* 32, *and Exh.* 9, *Trans.* 2401–2425.

Thus, in December, 1846, we find that Mr. Alex. Forbes was the lessee of the mine for the term of sixteen years, and the owner of five *barras*,—or rather, to speak more correctly, of four—because one of the *barras* which Castillero conveyed to him was purchased for the account of two young friends of Mr. Negrete.

III. Mr. Alexander Forbes' next step was to take possession of the mine and commence operations. He lost no time in doing so, as will appear by the following letter to James Alexander Forbes, written on the seventh January, 1847, only a few days after he had received from Mexico the *testimonios* of the instrument of ratification and sale:

TEPIC, Seventh January, 1847.

JAMES A. FORBES, Esq., California.

My Dear Sir:—I had the pleasure to receive your very obliging

letter of the twenty-ninth October last, which chiefly relates to the mine of quicksilver, about which I wrote you at so much length by Mr. McNamara. I had previous to the receipt of your letter been in treaty with D. Andrés Castillero, respecting this mine, and on the arrival of Mr. McNamara with the powers from the other proprietors, the treaty was much facilitated, and I am now happy to inform you that I have contracted for the habilitation of the mine, and have also purchased a part of Mr. Castillero's "barras," all of which will be made known to you by Mr. Walkinshaw, who goes to California as my attorney and agent for the examination and working of the mines. Mr. Walkinshaw will wait upon you as soon after his arrival as possible, and will show you all the documents, and ask your advice and assistance in carrying out my views.

It is needless for me to say more than that I count on you as a friend, who will lend your best assistance to bring this negotiation to a good account; and as you inform me that you are the proprietor of two barras, it will be for your interest, and that of all others concerned, that every means may be used to make the most of it. I have sent up a small sum of money to make a beginning, and if Mr. Walkinshaw is of opinion that the business ought to be carried on to a large extent, the necessary apparatus will be ordered, and ample funds sent on to carry on the business properly. I have for the present only one hundred and fourteen iron bottles, but I can get a large quantity in this country when they may be required. Mr. Walkinshaw will inform you that everything is left open respecting the interest which he and others may take in this enterprise, and I trust you will also leave with me the regulation of the affair, which must depend on after prospects. For the present I wish no one to run any risk or to incur any expense but myself, which, however, you must be aware will be very considerable; but if the mine turns out well there will be sufficient for all.

I, in conclusion, beg leave to recommend most strongly my friend Mr. Walkinshaw to your best attention and assistance, and I am sure you will find him most worthy of your confidence.

I am, my dear sir,

Yours, most sincerely,

[*Transcript*, 383.] ALEX. FORBES.

In the letter just quoted, the interest of Jas. Alexander Forbes in the mine is alluded to. The time when he acquired this interest of two *barras*, or one-twelfth of the mine, is stated by himself as as follows: "About the time I took charge in 1846, I purchased from José Teodoro Robles and Secundino Robles, partners of Andres Castillero in the mine. The deed was not put on record until

some time afterwards; in fact it was not made out. In reality the purchase was made at that time." [*Transcript*, 450.] He must therefore have acquired his interest in the mine about September 22d, 1846, for, in a letter written on that day, he informs Mr. Alexander Forbes (I presume) that he is in charge of the quicksilver mine, and is going to work it until he can hear from Castillero, and is on the point of striking a bargain for four shares. [*Transcript*, 540.] And it must have been in his letter of the twenty-ninth of October, 1846, that he informed Mr. Alexander Forbes of his purchase, for the latter, in his reply of January 7th, 1847, just quoted, says—"and as you inform me that you are the proprietor of two barras," etc.—*Transcript*, 383.

The exact date of Mr. Walkinshaw's arrival in California is not known; but General Halleck says: "On the road between San Luis Obispo and Santa Barbara," in March, 1847, "I met Mr. Robert Walkinshaw, who told me that he had landed at Santa Barbara, and was on his way to New Almaden to take charge of the quicksilver mine; that a vessel, with tools, etc., for working it, was on its way to Monterey, or was expected at that place. I remember the fact from his giving me some information connected with the war in Mexico, and he said he had dispatches for the Commodore of the American squadron."—*Transcript*, 360—*Halleck's Deposition.*

I infer that somewhere between the middle and end of March, 1846, Mr. James Alexander Forbes, the agent of the owners of the mine, relieved himself of its custody by transferring the possession and control of it to Mr. Robert Walkinshaw, the agent of the company to whom it had been recently leased for the term of sixteen years, and who had undertaken to work it. The letter of the seventh of January, 1847, copied above, was brought to California and delivered to James Alexander Forbes by Mr. Walkinshaw, the new agent. And, doubtless, Mr. Walkinshaw told James Alexander Forbes all about Mr. Alexander Forbes' contract with McNamara in Tepic, and its ratification by Castillero in Mexico, and the purchase of the five *barras*, and showed him the documents relating to said transactions, as that letter promised he would do. And particularly must he have exhibited to Mr. Jas. Alex. Forbes Castillero's ratification of the McNamara lease; for, otherwise, how

could Mr. Walkinshaw, in the name of the lessee, reasonably demand the possession of the mine, and how could Mr. James Alexander Forbes, on behalf of the owners, feel justified in surrendering it.

Mr. Alexander Forbes, Mr. Robert Walkinshaw, and Mr. James Alexander Forbes, were "brither Scots," whose due share of the shrewdness and steady business habits for which their nation is proverbial, had brought them into places of responsibility, and made them well to do in the world. A Scotchman, who is sent by a Scotchman, all the way from Tepic, in the Department of Jalisco, to Santa Clara, in the Department of California, to demand of a Scotchman, who is the agent of the owners of a valuable mine, and himself part owner of the same, that he shall surrender possession of it, would be likely to bring with him some documentary evidence of the right of possession; and it would naturally occur to the one who is called on to hand over such a valuable estate to the other, to request the privilege of looking a little into the documents, before he parted with the property. Mr. Walkinshaw, when he reached the mine, had traveled far by land and sea. To take possession of the mine and work it, was the sole object of his coming to California. It is likely enough that the vessel which landed him at Santa Barbara, and proceeded thence to Monterey, had been chartered for the voyage; but it is not likely that all this trouble and expense would have been incurred, without the right to demand possession of the mine, and the legal evidence of that right, in the shape of documents.

Nor is it likely that James Alexander Forbes would surrender his own property and that of his employers to Mr. Robert Walkinshaw, merely because he had come so far to take it. Besides, does not Mr. Alexander Forbes, in his letter of the seventh of January, 1846, to James Alexander Forbes, accrediting Mr. Walkinshaw, by whom it was delivered, inform James Alexander Forbes that with Castillero, and McNamara, the agent of some of the proprietors, he had concluded the contract of *avio*, and that he had also purchased some of Castillero's *barras;* and does he not add that Mr. Walkinshaw will tell him all about these transactions, and show him the documents relating thereto?

PART THIRD.

From April, 1847, to October, 1847; Containing an Account of James Alexander Forbes' Suggestions for Remedying the Defects in the Title Papers, Copies of which Walkinshaw had brought from Mexico, and exhibited to him.

I. "True it is," says James Alexander Forbes, in an affidavit in a suit between Robert Walkinshaw and himself, filed the twentieth of October, 1849, and offered in evidence by the Government, "that in the month of April, 1847, the plaintiff, (Walkinshaw,) took possession of the said mine, by virtue of a power of attorney given him as agent by Alexander Forbes, of the City of Tepic, Mexico, the principal owner and sole *habilitador* or authorized contractor for the working of said mine; and that the said plaintiff, by virtue alone of said power, continued to work the said mine as the agent of the said Alexander Forbes, and in his name, until the month of August, 1849."—*Transcript*, 275.

We have seen that in the instrument by which Castillero ratified the McNamara contract, he undertook that the same contract should be affirmed by the part owners of the mine residing in California, who had not authorized McNamara to act for them. The language in which Castillero ratifies the McNamara contract, is the following:

The aforesaid Don Andres Castillero proceeded to say that, in the most solemn manner which the law permits, he declares: *That he binds himself, on his part, to fulfill exactly and faithfully, as one*

of the partners contracting with Señor Forbes, everything contained in the above inserted instrument, (meaning the contract between McNamara and Alexander Forbes) *which he approves and ratifies in all its parts, desiring that he may be held from this time forth as one of those bound to the fulfillment of its literal contents.* From this day, until the expiration of the term of the sixteen years of the contract, he binds himself, and his heirs and successors, not to demand anything against the instrument above inserted, but if he should so do, he desires that he may not be heard either in or out of Court.

He undertakes for his partners in California in the following words:

And, in regard to the want of formality which may be observed in the power of attorney inserted in the instrument copied in this present (meaning the power of attorney from Castro to McNamara) he (Castillero) *binds himself to obtain the explicit consent of his copartners, who will ratify the present instrument, to remove any doubts which might occur with respect to the authority of the Padre Don Eugenio McNamara*, given by the copartners of Señor Castro and the declarant.—*Trans.* 2503.

In fulfillment of this undertaking of Castillero's, James Alex. Forbes, as the attorney in fact of Secundino and Teodoro Robles, part owners of the mine, neither of whom could read or write [*Trans. p.* 465] on the fourth of May, 1847, prepares and signs an instrument ratifying the McNamara contract. Observe how closely he follows Castillero's language, and with what full reference to it he is acting. I give the entire instrument.

Whereas, Don José Castro, resident of Monterey, in the Territory of Upper California, partner in a mine of quicksilver, situated in the jurisdiction of the Pueblo of San José de Guadalupe, and which mine is known by the name of Almaden de Santa Clara, executed in the port of Monterey, the twelfth day of the month of June, one thousand eight hundred and forty-six, a special power of attorney, authorizing the Presbyter Don Eugenio Macnamara to contract with an English company to undertake the working of, and provide the supplies (*avio*) for the said mine of quicksilver; which contract said Señor Macnamara effected in the city of Tepic, the twentieth of November, one thousand eight hundred and forty-six, with Señor Don Alejandro Forbes, a British subject and Consul, for himself, and in the name of the company which he represents,

reducing the same to a public instrument, *and approved and ratified by Andres Castillero, resident in Mexico*, and also a partner in said mine; and said *Castillero having bound himself to obtain the explicit consent to and ratification of said contract on the part of his copartners, residents of this Department, because of the doubts which might arise in regard to the authority of Señor Macnamara*, I, James Alexander Forbes, Vice-Consul of H. B. M. for the Californias, authorized by general power of attorney full and unlimited, from Don Secundino Robles and Don Teodoro Robles, partners in said mine of Almaden de Santa Clara, *declare that I covenant, in the most solemn manner permitted by law, and bind myself to fulfill exactly and faithfully everything contained in said instrument of contract celebrated with Señor Don Alejandro Forbes and the company which he represents. I approve and ratify the same in all its parts, desiring that I may be held as one of those bound to the fulfillment of its literal contents from the time of its execution to the expiration of the sixteen years stipulated in the said contract*, in the understanding that all the concessions and privileges that the Supreme Government of Mexico may have granted, or in future may grant, to the owners of the said mine of quicksilver of Almaden de Santa Clara, in compensation of the premium or reward offered by said Government (as appears from its decrees) for the discovery and working of mines of this class, shall be for the benefit of the owners of the mine, in accordance with the shares which they hold in the same.

In testimony of all the foregoing, and for the faithful and exact fulfillment of the same, I have signed this document in the name of my aforesaid constituents, on common paper, because of the total want of stamped, and have affixed thereto my official seal in defect also of a competent officer in this place, the Mission of Santa Clara, Upper California, Republic of Mexico, the fourth day of May, 1847.

JAMES ALEXANDER FORBES.

[*Transcript, O. H. X. No.* 8; *Trans.* 547. I have taken the liberty to italicize a few lines.]

On the thirtieth of June, 1858, James Alex. Forbes, says: "On the former occasion of my examination, I think I stated that I did not then recollect whether I had seen the contract of *avio*, but I did state, that a copy of a document alluding to it was presented to me by Mr. Walkinshaw, in which Castillero obligated himself to obtain the ratification of his contract with Mr. Alexander Forbes, and which I, as the representative of four shares, in conformity

with Mr. Alexander Forbes' wishes, did ratify, *my ratification being a copy verbatim of that of Castillero*, adding thereto that they should participate *pro rata* in any emoluments or grants obtained from the Mexican Government."—*Trans.* 837, 838.

The day after he executed this instrument, that is to say, on the fifth of May, 1847, in a letter to Mr. Alexander Forbes, he says: "With respect to the ratification of the contract between yourself and Mr. McNamara, for the *habilitacion* of the mine, as promised by Don Andres Castillero, I, as attorney or procurator of the two Robles, send that document, in which I ratify (in their name) the contract, and make allusion to the privileges conceded by the Mexican Government to the owners of quicksilver mines; for in lieu of these privileges, it was expressly stipulated by Don Andres Castillero and his *socios* (copartners) that they should all participate in the two sitios of land to be asked of the Departmental Government. This will also be advantageous to you, independent of its justice." —*Trans.* 843.

The direct reference to Castillero's ratification of the McNamara contract, made by James Alex. Forbes in his ratification of the same instrument, and the closeness with which its expressions are copied, establish beyond doubt the truth of his statement in his disposition in this case, to the effect that, although he cannot precisely recollect what was the nature of the document presented to him by Mr. Walkinshaw in 1847, purporting to be a ratification of the contract of *avio* by Castillero, yet, when he (J. A. F.) made his ratification of that contract in May, 1847, Mr. Walkinshaw did show him a document purporting to be a ratification of the same by Andres Castillero, [*Trans.* 463]; and that when, as the attorney in fact of the two Robles, he came to ratify the same contract, he copied verbatim the words in which Castillero had ratified it [*Trans.* 837, 838.] This conclusion is made still more certain, if such a thing be possible, by what follows in J. A. Forbes' letter of the fifth of May, 1847.

In order to understand it thoroughly, let us revert for a moment to the document by which Castillero, in the city of Mexico, on the seventeenth of December, 1846, ratified the McNamara contract. This ratification was made, as we have seen, by a public act passed before Nazario Fuentes, a Notary public; that is to say, the parties

either drafted their agreement and took it to the Notary to write out in his book, or made known their agreement to him, and he wrote it down himself. In either case the contract would be written in the Notary's book of Protocols, and there, in his presence, and in that of three assisting witnesses, signed by the parties. This was done. The instrument by which Castillero ratified the McNamara contract was written in the book of Protocols of Nazario Fuentes, and was signed by Castillero, and by Negrete as the agent of Mr. Alexander Forbes. This instrument contains—

1st. A statement of the appearance of the parties before the Notary.

2d. A copy of the McNamara contract of *avio*, which itself contains a copy of the power of attorney from Gen. Castro to McNamara.

3d. The ratification of that contract by Castillero.

4th. The cession by Castillero, in favor of Alexander Forbes and the company, "for the sixteen years of this contract of *the two square leagues of land of which the Supreme Government has made him* (Castillero) *a grant, as is shown by the official document which he presents, that it may be copied at the end of the present instrument*, and be inserted in the copies which may be issued of the same."

5th. Castillero's undertaking that his copartners will also ratify the McNamara contract.

6th. The usual clauses of renunciation and warranty.

7th. The signatures of Castillero and Negrete, the names of the attesting witnesses, and the signature of the Notary; and

8th. *The copy of the official document constituting the grant of two square leagues referred to in the body of the instrument as having been exhibited to the Notary, and as being copied at the end of it.* This copy is signed by the Notary.

Now let us look for a moment at this document of title for two square leagues. It is an official communication, or, as James Alexander Forbes calls it, a decree, addressed by Castillo y Lanzas, Minister of Relations, to the Governor of California, on the twenty-third of May, 1846.

It begins by informing the Governor that, on the twentieth of

May, 1846, the Minister of Relations had received an official communication from the Minister of Justice. Then follows a copy of that communication, the substance of which is, that the President of the Republic had received Castillero's proposals, had approved them in all their parts, and directed the proper orders to issue, relative to the grant of lands in California. "And I have the honor to enclose it to your Excellency," says the Minister of Justice to the Minister of Relations, "to the end that, with respect to the petition of Señor Castillero, to which his Excellency the President *ad interim* has thought proper to accede, that as a colonist there be granted to him two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding."

"Wherefore," says the Minister of Relations to the Governor of California, "I transcribe it to your Excellency, in order that, in conformity with what is provided by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two square leagues which are mentioned."

We now understand the contents of the instrument by which Castillero ratified the McNamara contract. It is one entire document. A copy of it was brought by Mr. Walkinshaw to California, and by him, in April, 1847, exhibited to James Alexander Forbes, who was at that time interested in the mine to the extent of two *barras*, although nominally the mere attorney in fact of the two Robles.

Owing to Castillero's detention in the Capital, the general suspension of business, and the difficulty of communication between the city of Mexico and the Department of California, caused by the war, it is very probable, and, indeed, almost certain, that the first knowledge acquired by the mine owners in California of the grant of two square leagues by the Supreme Government to Andres Castillero, was derived from the copy of that grant in Castillero's ratification of the McNamara contract. As soon as James Alexander Forbes saw it, he manifested his usual zeal in matters of property, by claiming for the two Robles, one-half of whose share he owned [*Transcript*, 463] as partners in the mine, their due portion of the two square leagues; for, says he, in his letter of fifth of May, 1846, to Alexander Forbes: "It was expressly stipulated by Don Andres

Castillero and *socios* (partners) that they should all participate in the two *sitios* of land to be asked of the Departmental Government." And to bring over Mr. Alex. Forbes to that view of the matter, he adds: "This will also be advantageous to you, independent of its justice." [*Transcript*, 843.] Of course it would, and more advantageous than James Alexander Forbes then supposed; for just about that time, and after Walkinshaw had left Tepic, Mr. Alexander Forbes had bought four shares in the mine from Gen. José Castro, which, with those purchased in the preceding December from Castillero, made him the owner of one-third of the mine.

So particular is James Alexander Forbes in claiming an interest in the two-league grant, that, it will be observed, he approves and ratifies the McNamara contract, "in the understanding that all the concessions and privileges which the Supreme Government of Mexico may have granted, or in future may grant to the owners of said mine of quicksilver of Almaden de Santa Clara, in compensation of the premium or reward offered by said Government (as appears from its decrees) for the discovery and working of mines of this class, shall be to the benefit of the owners of the mine, in proportion to the shares which they hold in the same." See his ratification.

Mr. James Alexander Forbes, then owning a part of the mine, and claiming a corresponding share of the two square leagues, felt a great interest in the property at this period, and naturally looked to the muniments of his title. Believing them to be in some respects defective, and being an unscrupulous man, he permitted himself to suggest the means of procuring further assurances.

On examining the copy of the Castillo Lanzas decree, which is the colonization grant appended to Castillero's ratification of the McNamara contract, Mr. James Alex. Forbes perceived that it was an order from the Supreme Government to the Governor of California to put Castillero in possession of the two square leagues which had been granted to him.

Now, when Mr. James Alex. Forbes first saw this decree, which was in April, 1847, all the Mexican authorities in California had been displaced. There was no Governor of California who owed obedience to the Mexican Government, or who would be likely to execute its orders. For instance, thought Mr. James Alex. Forbes,

in May, 1847, suppose I were to take this Castillo Lanzas decree to Col. Mason, in Monterey, the only Governor of California I know of: would he execute it? Would he put me, as the agent of Castillero, in possession of these two square leagues? There would be a much greater chance of this "new and arbitrary Governor of California," as he calls Col. Mason, putting me in prison for making so preposterous a demand.

"This Departmental Government," says Mr. Forbes, in his letter of the fifth of May, 1847, to Mr. Alex. Forbes, "is completely *acefalo;*" that is to say, it has no Mexican head or Governor, "in consequence of which, the possession of the two *sitios*, ordered to be given by the dispatch of Señor Castillo Lanzas, has not been obtained, nor cannot be obtained, nor even mentioned, without imminent risk of opposition on the part of the American Government in this Department." *Trans.* 843.

This statement is made for the purpose of convincing Mr. Alex. Forbes of the utter worthlessness of the Castillo Lanzas decree as a title to land, in the state of affairs then existing in California, and to prove to him, as James A. Forbes says, that "it is of the most vital importance to obtain from the Supreme Government of Mexico a positive, formal and unconditional grant of the two *sitios* of land conceded to Don Andres Castillero, according to the decree appended to the contract, (that is, the Castillo Lanzas *decree* copied in Castillero's ratification of McNamara's *contract*) and also an unqualified ratification of the juridical possession which was given of the mine by the local authority of this jurisdiction, including, if possible, the 3,000 varas of land given in that possession as a gratification to the discoverers. The documents should be made out in the name of Don Andres Castillero and *socios*." *Trans.* 843. "It is indispensable that the title and ratification of possession should be of the date of the decree of Señor Lanzas." *Trans.* 843.

James A. Forbes evidently thought that if he could procure the manufacture and ante-dating of a grant such as he describes, he would avoid the necessity of applying to the Governor for possession, which he regarded as the most dangerous feature in the Castillo Lanzas decree. There was another feature in that decree which he carefully advised should be kept out of the new title. Mark his circumspection and foresight: "The documents should be made

out in the name of Don Andres Castillero *and socios*," of whom he was one, and not in the name of Andres Castillero alone, as was the case in the Castillo Lanzas title. But there was one particular in which he would have the fraudulent perfect title correspond with the genuine imperfect title. It is indispensable, he says, that the title to be manufactured should be of the date of the decree of Señor Lanzas.

"The information that I received," says James Alex. Forbes, "both oral and written, at the date of this letter, fifth of May, 1847, was derived from Mr. Walkinshaw. It is true, that I have stated the necessity that the act of possession of the mine should coincide with the document stated herein to be a decree of Señor Lanzas, a copy of which Mr. Walkinshaw exhibited to me. In the document shown to me by him at that time, I, of course, observed the date appended to that decree." "I have to state," says Mr. James A. Forbes, in the next answer, "that the copy of the document exhibited to me at that time (fifth of May, 1847,) by Mr. Walkinshaw, purported to be an order from Castillo Lanzas to the Departmental Government of California, to put Castillero in possession of two *sitios* of land, without any ratification of the possession of the mine given by the local authorities; and hence my suggestion to Mr. Forbes for the procurement of such ratification. *Trans.* 924–925.

In this letter of the fifth of May, 1847, it will be observed further, that James Alex. Forbes advises the making and ante-dating of a document containing a confirmation by the Supreme Government, or, in his language, "the unqualified ratification of the juridical possession which was given of the mine by the local authority of this jurisdiction, including, if possible, the 3,000 varas of land given in that possession as a gratification to the discoverers."

This advice was given in ignorance of the fact that such a confirmation had been obtained by Castillero on the twentieth of May, 1846. Castillero, as we have seen, made a proposition to the *Junta de Fomento*, consisting of nine articles. The seventh was, that the Supreme Government should approve his mining possession, as it had been given him by the local authorities in California, and as he then held it. The eighth was for a grant of two leagues of land around the mine. On the twentieth of May, 1846, the Minister of Justice, in an official communication addressed to Don Vicente

Segura, President of the *Junta de Fomento*, informed that body that the President of Mexico had been pleased to approve Castillero's propositions in all their parts. This communication we claim to be the confirmation of the mining possession by the Supreme Government. It is true, that a copy of this communication was inserted in the letter of the Minister of Justice to the Minister of Relations, which letter was copied in the despatch of the Minister of Relations to the Governor of California on the twenty-third of May, 1846—the two-league grant; but, without knowing what propositions Castillero had made to the *Junta*, it was impossible to learn from the communication of the Minister of Justice to the *Junta de Fomento* the particular things of which the President of Mexico had approved.

When James Alexander Forbes wrote the letter of the fifth of May, 1847, he did not know what proposals Castillero had made to the *Junta de Fomento*, and, of course, he was ignorant of the effect of the President's approval of those proposals. As late as the twentieth of December, 1849, he says in one of his letters: "I know not what conditions Castillero may have proposed to the Supreme Government of Mexico, but whatever they may have been, they cannot be fulfilled in California, by reason of the change of Government." *Trans.* 1847.

The letter of the fifth of May, 1847, contains the sum and substance of all the fraudulent suggestions which from time to time James Alexander Forbes made to the parties in Mexico, down to the early part of the year 1850. The subject was not resumed until, according to his statement, he went to Tepic in 1849. He says, that on the twenty-seventh of May in that year, he left a memorandum in Tepic with Mr. Alexander Forbes, containing the same suggestions. From that time until the twenty-sixth of February, 1850, he continued to urge the manufacture of new titles.

It is curious to observe how Mr. James Alexander Forbes' objections to the Castillo Lanzas grant change with the circumstances of the country and with the various forms assumed by the opposition to the Almaden title; and how his suggestions as to the features of the new grant, and his arguments in support of them, are modified by what he conceives to be the necessities of the case. In May, 1847, his great objection to the Castillo Lanzas decree as a

title, consisted in the fact that, California having passed from the dominion of Mexico, there was no Governor who owed obedience to that country, and who would obey the order to put Castillero in possession. So far as Mexican authority was concerned, California, to use his expression, was *acefalo*—headless.

In the latter part of 1849, when certain parties were seeking to purchase the Berreyesa title—which they asserted covered the Almaden mine—his objection to the Castillo Lanzas two-league grant takes another form. It then occurred to him, that as by that document two leagues of land are granted to Castillero on his mining possession, and as by the act of the Alcalde conferring that possession, the mine is described as being on Berreyesa's Rancho, a serious objection to the title might be raised on that ground. And afterwards, when he considered the Castillo Lanzas grant in reference to the probability of its recognition by the United States Government, he doubtless anticipated the stereotyped objection of the want of definite boundaries and segregation from the public domain.

These three objections to the validity of the Castillo Lanzas grant are scattered throughout his letters. The first objection is urged in the letter of the fifth of May, 1847, and, I believe, is raised in none other; for before he took up the subject again in 1849, the treaty of peace had been made, and it is possible he had discovered that an American Military Governor was not so terrible a character as he once supposed. With the other two objections, his letters from the middle of the year 1849 to the month of February, 1850, are filled.

When in July, 1858, Mr. James A. Forbes was summoned for the second time as a witness in this case in behalf of the Government, I asked him this question: "Then you considered Castillero's title, as set forth in Castillo Lanzas' decree, appended to the contract of *habilitacion*, good enough as far as it went; but you conceived something more was necessary, and that was a ratification by the Supreme Government of the act of possession given by the local authorities of California—am I correct?" To which Mr. Forbes responded: "Not exactly. I did not consider the decree of Castillo Lanzas to be good, because it was nothing more than a simple order to put Castillero in possession of a tract of land, with-

out specifying boundaries. I did consider that the ratification of the possession, in accordance to the mining ordinances, by the Federal Government, would enable the claimant to hold the mine and *hacienda*."

I next asked him the question: "Then, if on the fifth of May, 1847, you had known that Castillero had proposed to the Supreme Government of Mexico a contract, one of the articles of which was, that the Supreme Executive should ratify and confirm to him the possession of three thousand varas in every direction from the mouth of the mine, which had been given him by the local authorities in California, and that the Supreme Government had approved the contract proposed by Castillero in all its parts, the only fault which you could have found with Castillero's title would have been, that it did not describe with sufficient accuracy the boundaries of the two square leagues of land, into the possession of which it directs the Governor of California to put Castillero—am I correct?"

Mr. Forbes replies: "If I had known that Castillero had succeeded in obtaining the documents described in the question, I would have believed his title to have been good, with the exception expressed in the question, viz., the want of description of boundaries, which would have subjected the claimants to a litigation with the claimants of the adjoining lands."

Having gotten so much out of the witness, I concluded this branch of the examination with the following question: "It appears from your letter of the fifth of May, 1847, that you were dissatisfied with Castillero's title, consisting of the decree of Señor Lanzas, appended to the ratification of the contract of *avio* by Castillero, a copy of which had been exhibited to you by Mr. Walkinshaw, and that your dissatisfaction arose from what you conceived to be two defects in that title—first, the absence of specifically named boundaries; secondly, the want of confirmation by the Supreme Government of the mining possession which had been given to Castillero by the local authorities of California; and that in consequence of those defects you gave the advice contained in your letter of the fifth of May, 1847; and it further appears that at the time that letter was written, you had no reason to believe that the title papers of Castillero were not *perfectly genuine?*" To which Mr. Forbes replied: "I answer, yes."

"It follows, therefore," I continued, "does it not, that the first idea of the necessity of having other title papers made originated with you; that the first recommendation of such a course proceeded from you, and that this was done simply because you did not have confidence in the legal effect and operation of a genuine title paper?" Mr. Forbes responded: "I state that, in order to remedy the defects alluded to in the title, the course pointed out by me suggested itself as the most proper mode of remedying those defects. I am unable to state whether that suggestion was the first that had been made to the parties in interest, for the object expressed, by any other party than myself; that it was not particularly based upon my knowledge of the legal effect of the genuine title, but for the reason already stated, viz., want of boundaries, and ratification of the possession."—*Transcript*, 931, 932.

II. For the purpose of becoming more familiar with dates, and of ascertaining precisely the condition of the affairs of the mine in May, 1847, let us very briefly recapitulate a part of this history.

On the twelfth of June, 1846, General Castro gave a power of attorney to Eugene McNamara, to negotiate with an English company a contract of *habilitacion* of the mine.

On the twenty-second of December, 1846, (or about that time,) James Alexander Forbes purchased from the Robles two of their *barras*, or shares, in the mine.

On the twenty-eighth of November, 1846, Eugene McNamara, in the City of Tepic, entered into such a contract, on behalf of the owners of the mine, with Mr. Alexander Forbes of that place.

On the seventeenth of December, 1846, through the agency of Don Francisco Martinez Negrete, Mr. Alexander Forbes procured the ratification of the McNamara contract by Don Andres Castillero, in the City of Mexico; and also a lease for the term of that contract—sixteen years—of the two leagues of land around the mine, which had been granted to him on the twenty-third of May, 1846, by the Supreme Government.

This ratification was made in an instrument in writing, called a public act, written in the book of Protocols of a Notary Public, and signed by Castillero and Negrete.

The original title for the two square leagues was exhibited to Mr.

Negrete by Castillero, and handed to Mr. Romero, the lawyer, to aid him in drafting the instrument of ratification; it was exhibited to the Notary, and copied verbatim in that instrument, and then delivered by Castillero to Mr. Negrete, by whom, on the nineteenth of December, 1846, it was sent to Mr. Alexander Forbes, in Tepic.—*Negrete's Dep. ans.* 32; *Transcript*, 2401.

On the same day on which Castillero ratified the McNamara contract, he also sold to Mr. Alexander Forbes five shares in the mine, for the sum of four thousand dollars. The sale was made by public act. The conveyance was written in the book of Protocols of the same Notary, and begins on the pages on which the instrument of ratification ends; that is to say, on the page on which the copy of the two-league grant, appended to that instrument, ends.—*Brodie's Dep.; Transcript*, 1063.

A *testimonio* of each of these two instruments, that is, the instrument of ratification and sale, was delivered by the Notary to Mr. Negrete, and by him sent to Mr. Alexander Forbes in Tepic, on the nineteenth of December, 1846.—*Negrete's Dep., ans.* 33; *Transcript*, 2401.

A copy of the same instrument of ratification was obtained from the Notary's office by Mr. Negrete for Mr. Alexander Forbes, and transmitted to him on the sixth of February, 1847.—*Negrete's Dep., ans.* 34; *Transcript*, 2402.

The original document of title for two square leagues, which Castillero, in December, 1846, delivered to Mr. Negrete, by whom, on the nineteenth of that month, it was sent to Mr. Alexander Forbes; and the *testimonios* of the instrument of ratification, which Mr. Negrete sent to Mr. Forbes on the same day; and the copy of said instrument of ratification, which he sent to Mr. Forbes on the sixth of February, 1847—all of which are in evidence in this case—were exhibited to Mr. Negrete on his examination, and by him identified and proved.—*Negrete's Dep., ans.* 35, 36; *Transcript*, 2402.

On the seventh of January, 1847, Mr. Alexander Forbes wrote from Tepic to James Alexander Forbes in California, informing him of the McNamara contract of *avio*, of Castillero's ratification of it, and the sale of five *barras;* and advised him that Mr. Walkinshaw, who was coming to California to take possession of the mine and commence operations, would tell him all about those transactions, and show him the documents relating to them.

In April, 1847, Mr. Walkinshaw took possession of the mine under the McNamara contract, ratified as it was by Castillero in Mexico.

On the fourth of May, 1847, James Alexander Forbes, carrying out Castillero's promise, as part owner of the mine and as agent of the two Robles, also part owners, ratified the said McNamara contract in the very words in which Castillero had ratified it—copying his language verbatim—in the understanding, he adds, that the two square leagues belong to the mine-owners in proportion to their interests in the mine.

On the fifth of May, 1847, James Alexander Forbes addressed a letter to Mr. Alexander Forbes, informing him of Mr. Walkinshaw's arrival, and that he is in possession of the mine. In this letter he claims for Castillero's partners an interest in the two-league grant set forth in the Castillo Lanzas decree, proportioned to their shares in the mine; and, owing to what he conceives to be legal defects in that grant, suggests the fraudulent procurement of antedated title papers.

We can now appreciate the condition of affairs in May, 1847.

Shortly after Mr. Walkinshaw took possession of the mine in April, 1847, he returned to Mexico, leaving Mr. James A. Forbes in temporary charge of the mine. The exact date of his departure is not known; but very probably it occurred in June, 1847; for on the fourteenth of July in that year, J. A. Forbes informed Alex. Forbes that "up to the present time nothing has occurred to affect the quiet occupation of the mine of Almaden. Since the departure of Mr. Walkinshaw, Mr. Alden has done little in the mine, in consequence of the scarcity of operatives. The Indians have almost all left him, and such is the indolence of this class of people that I am quite certain you will never be able to do anything with such laborers. I should advise you to try and procure some of the natives of the Sandwich Islands, through the influence of Mr. Wyllie."—*Exh. O. H. X. No.* 3, *Trans.* 541.

It is perhaps worth while to note, that in this letter James A. Forbes mentions the discovery of a splendid specimen of quicksilver ore at a "spot within or near the limits of the two leagues conceded to Castillero and *socios;*" and adds, he had informed the discoverers that he "could not permit any claim or operation to be entered upon until the land should be measured."—*Trans.* 541.

PART FOURTH.

FROM OCTOBER, 1847, TO MARCH, 1848, INCLUDING MR. ALEXANDER FORBES' VISIT TO CALIFORNIA, AND AN ACCOUNT OF HIS TRANSACTIONS CONNECTED WITH THE MINE.

I. The next notable event in the history of the mine is the arrival of Mr. Alex. Forbes in California, in the latter part of September, 1847. This circumstance, although in itself a matter of no moment, has been invested with much importance by the heated imaginations and strained conceits of the Government's special counsel, in the suit of the United States v. John Parrott and others, praying for an injunction and receiver.

The correspondence between the two Forbes, part of which has been offered in evidence by the Government, and part by the claimant, discloses very fully the nature of Mr. Alexander Forbes' transactions in reference to the mine, during his sojourn in California. They were as follows:

First. A thorough exploration of the mine, to ascertain the width and direction of the vein, and the average richness of the ores.

Second. A reformation of the act of possession, as given in December, 1845; and an increase of the number of pertenencias.

Third. A survey of the two square leagues which had been granted to Castillero, as shown by the Castillo Lanzas decree; and, in connection therewith, the settlement of boundaries with the Berreyesas on their co-terminous sides.

Fourth. A negotiation for the purchase of the four *barras* originally belonging to the Robles brothers, two of which James

Alexander Forbes had purchased from them as far back as September, 1846, although the written conveyance is dated fourteenth September, 1847. The consideration expressed in the instrument of sale is $3,860.—*Trans.* 172, 450.

To recapitulate more fully:—1st. The first of the letters that passed between James A. Forbes and Alex. Forbes, while the latter was in California, is dated October 1st, 1847, and simply informs J. A. Forbes of Alex. Forbes' arrival in Monterey on the thirtieth September.

The next letter is written from the mine, on the nineteenth November, 1847, addressed to James A. Forbes. By that time it appears he had entered upon his examination of the vein. I give the entire letter:

MINE, 19th November 1847.

JAMES A. FORBES, ESQ.:

My Dear Sir:—I wrote you the other day, which did not find you at home. I am still here preparing the apparatus for making a better trial of the ore; but as Mr. Wallis, the artisan, is unwell, we go on but slowly. I am also very anxious to have the mine cleared out and put in a proper working state before I leave it, and for this purpose we have been sinking a "plan" at the "Respaldo Alto," in order to run a testero across the vein, and so discover the value and abundance of the ores in its whole width. In doing this, we have most unexpectedly found that in this plan there is no cinnabar whatever, although over it, in the upper part of the vein, there are ores. This puzzles us greatly, but we hope that in cutting across we will fall in again with ores towards the "Respaldo Bajo." Can this mine be a manto? I must verify that, and so must you and the Padre, with your own eyes. I see very good ores in the upper part of the mine, in all directions; but why does it get into borra lower down? The plan is about five varas lower down than where you and the Padre wrought, and on the other side of the vein.

The people will go on cutting across, and when they again get into metal, I will send you a man on purpose. I am confident we shall find them, but there will always be about two varas or more of the vein next the Respaldo Alto without ores; at least I think so, and I hope nothing worse may be the case. We still see good ores in the upper part of the vein near the Respaldo Bajo, where you and the Padre took out your ores.

I have been somewhat alarmed about the borra, but I hope there will ultimately be no cause for this, yet I have thought it right to

inform you and the Padre, and have no doubt but that my *Express Courier* will, in a few days, carry better news.

I am, my dear sir, yours very truly,

[*Trans.* 385.] ALEX. FORBES.

The next thing we hear of Mr. Alexander Forbes, is contained in his letter of the twenty-fourth November, 1847, communicating the fact that the vein, or *cinta*, of ores, of which they have been in search, is at last discovered. This letter I give entire, also:

MINE, 24th November, 1847.

For Mr. J. A. FORBES and
the PADRE REAL, Santa Clara.

We have at last found the vein or "cinta" of ores which we were looking for, so that I have now the pleasure to inform you and the good Padre of our luck, as I promised I should do; but I fear this mine will be reduced to this *cinta*, and the great body of it will be *tepetate muerto;* but, perhaps, the *cinta* may be wider below than it is above. To see whether this is so or not, has been the object of our labors *since discovering the proper direction of the vein of the whole mine*, which discovery makes everything more plain. This direction was before *entirely mistaken;* of which and other things we will have a great deal to talk about when we meet. When Mr. Walkinshaw arrives, and takes a look at the mine, I think we shall take a turn to the Mission. I expect him to be at Bernal's Rancho this afternoon.

I may say now, that it is impossible we can go off the main vein of the mine, as it is entirely different from the walls, (*respaldos*) they being of a hard rock, of quite different character, whereas the vein is quite soft and easily distinguished. All we have to do is to look for the *cintas* which have got ores, which in my opinion will be reduced to one not very wide.—*Trans.* 386.

A. FORBES.

From these reports of Mr. Forbes' investigation, it has been argued by the counsel for the United States, that the mine never was taken possession of nor worked until the latter part of the year 1847. This assertion is not only disproved by an abundance of other testimony, but it is also directly contradicted by the letter of the nineteenth of November, 1847, above cited, in which Mr. Alexander Forbes, says: "We still see good ores in the upper part of the vein, near the *respaldo bajo*, where you and the Padre took out

your ores." Now it will be remembered that Padre Real had charge of the mine from Castillero's departure in April, 1846, to about September in that year, when it passed under the control of James Alexander Forbes, who continued in possession until Mr. Walkinshaw's arrival in April, 1847.

Nothing can be more natural than that Mr. Alexander Forbes, who had recently leased the mine for a term of sixteen years, and had undertaken to work it during that time at his own risk and expense, and had come all the way from Tepic to look after it, and who was the proprietor of one-third of it, should have made a thorough examination of all such particulars as were connected with the success of his enterprise. And what subject could possibly have possessed greater interest for him than the true resources of the mine, which, at a great outlay of money, he had engaged to develop. Upon them, everything depended. Ignorant of them, he could devise no reasonable plan of operations. The subject, surely, was an attractive one.

That it should not have been well ascertained, in 1847, whether there was a vein (*cinta*) of ore; or whether the ore was merely an isolated deposit or spread, (*manto*) is not at all strange. The question could only be solved by laborious scientific examinations, such as had not been conducted in the progress of the extractions which were made under the superintendency of Padre Real and James A. Forbes. The apprehension that the mine might be only a spread, or *manto*, was probably suggested to Mr. Alexander Forbes by the once celebrated quicksilver mines of Guancavelica, in Peru, where the mineral was deposited in a horizontal spread, or *manto*, as the Spaniards call it, the word literally meaning "a cloak." [*Salorzano Pol. Ind., Lib. VI., Cap. II., No.* 14.] These mines must have been exhausted long ago.

Nor was it at all strange that the ignorance of those persons who had previously examined the mine, considering the small extent to which it had been worked, had deceived them with regard to the *true direction of the vein of the whole mine.* They who are experienced in mining operations know that such mistakes are very common. The law, too, admitting their frequency, endeavors in a spirit of justice to correct them, that they may not cause detriment to the discoverer, by withholding from him the fruits due to his

enterprise and labor. This we shall see when we come to consider the right of the mine owner to change the boundaries of his mine so as to include the vein whichever way it may run.

The Government have introduced the following letter from Alexander to James Alex. Forbes:

N. ALMADEN, 19th January, 1848.

My Dear Sir:—I am very much obliged to you for your prompt attention to the business in hand, and return the espediente immediately.

I am much surprised at the result of your assay, and shall try what I have. It will of course be better to say nothing about it, particularly as I have already written to Monterey that there is no mine, nor does there appear to be any quantity of this kind of stuff.

I hope soon to see the Alcalde.

My dear sir, yours truly,

[*Trans.*] A. FORBES.

On this letter, the late Attorney General, in a report to the President of the United States, comments thus: "The land was not formally taken possession of under title until long after the occupation of California by the American forces. It was then done clandestinely, and accompanied with a written statement by the chief partner in the concern to the authorities at Monterey, that there was no ore there. The statement was of course known to be false, and the person who made it simultaneously wrote to his partner, and told him of the trick he had played." By this, the late Attorney General evidently means, that "the written statement by the chief partner in the concern to the authorities at Monterey, that there was no ore," was made to prevent such obstacles to the clandestine taking of possession, as might have been interposed had the true value of the mine been known.

I am sure the Court will be much surprised to learn, after having read that report, and consulted this record:

First. That there is not a scintilla of proof that the letter was addressed to the authorities at Monterey.

Second. That the Government have introduced in evidence the following petition addressed by the same Alexander Forbes, "chief partner in the concern" as he is described in the Attorney Gen-

eral's report to the Alcalde of the Pueblo of San José, *dated on the very day on which he wrote the letter under discussion.* It will be found in the *Transcript*, *p.* 806.

To the Justice of the Peace:

Alexander Forbes, in the name of himself and his associates, owners of the mine of silver, gold and quicksilver, known by the name of Santa Clara, and now called New Almaden, and in the name of the Company formed for the working and furnishing of the mine, before you as may be most proper in law, represents that the Mining Ordinance, in Title IX, Article 10, provides that every mine ought to be visited and examined by skillful persons named by the Judge, for the purpose of ascertaining if they are worked in conformity to said Ordinance; and the subscriber desiring to comply with the laws, prays you as the competent Judge (for want of the tribunal to whom it belongs to judge in the matter) that you will be pleased to go with your assisting witnesses to the said mine, to inspect its works and labors now being carried on, in conformity to the Ordinance upon the subject; as also to determine the direction and inclination of the vein of the said mine to its present depth, for the purpose of reforming and correcting (since there is occasion for it) the boundaries of the former act of possession, and to correct also such other mistake as may occur in it, according to Title 8th, Article 11, of the same Ordinance; particularly to decide upon the increase of pertenencias which ought to be possessed by the owners of the said mine, and its contractor (*habilitador*) for himself and as the representative of the former, and the square which corresponds to the said pertenencias in conformity to the true inclination of the vein.

Wherefore, I beseech you that you will be pleased to have this writing carried into execution in the terms expressed, and when the proceedings are taken, that they may be returned to me for the just protection and ends which may suit the persons interested, you being pleased to admit this on common paper, from the total want of sealed paper in this department.

Pueblo of San José, nineteenth of January, 1848.

Third. That the Alcalde, complying with the foregoing petition, did, two days after its date, to wit, on the twenty-first of January, 1846, officially visit the mine, with two assisting witnesses and a practical miner, "to examine the state of said mine, which was found worked in conformity with the Mining Ordinance, the sides being firm, its galleries and works in the best order, and free from rubbish

or other impediment, so that it avoids all danger to the workmen, and preserves the mine in good condition," etc., and made a record of his proceedings and duly filed them in the archives of his Court; a copy whereof the Government have introduced and proved in this case.—*Trans.* 805.

Fourth. That the formal possession of the land, which the late Attorney General says was *clandestinly* taken, was thus conducted, as described by the Surveyor Mr. Lyman. "I made such a survey in the month of February, 1848, at the request of James Alex. Forbes of California, and Alex. Forbes of Tepic, in Mexico, who was at that time at said mine. At the time the survey was made, I held a commission from General Mason, who was then Governor of California, as Surveyor for the middle Department of California, which embraced what is now Santa Clara County. I was requested to lay out two square leagues of land, and was shown either a grant or a copy of a grant from the Mexican Government for two square leagues," etc.—*See Lyman's Dep., Trans. pp.* 11, 12.

The survey made by a public Surveyor, a gentleman of unimpeachable character, holding a commission from General Mason, Governor of California, and in the presence of, and after consultations and compromises with, a large family of adjoining owners, was the secret act by which Mr. Forbes *clandestinely* took possession of the land under title, as alleged by the late Attorney General. In respect of strategy, this method of proceeding *clandestinely* to take possession of a large tract of land, is only equalled by the cunning measures Mr. Forbes adopted to conceal the value of the mine from the officers of the Government, in requesting one of them to inspect it thoroughly, with a practical miner and assisting witnesses, and to make a public record of all he should learn about it.

The grave errors into which Mr. Attorney General Black fell in his comments on this letter, are attributable to his entire misconception of the subject about which Mr. Forbes was writing. He was not writing about the Almaden mine at all. It was some other mine. In the latter part of the year 1847 and the beginning of 1848, many quicksilver mines in the neighborhood of the New Almaden were discovered and registered. This letter evidently referred to some such new discovery. Mr. Alex. Forbes says: "*I am very much surprised at the result of your assay, and shall*

try what I have." Could that refer to the Almaden mine? No assay of the Almaden ore could surprise Mr. Forbes. For two years before, it had been known to be immensely rich—much of it being pure cinnabar. Tons of the metal had been extracted, and were then being extracted and sold.

Mr. Forbes adds: "*It will of course be better to say nothing about it, particularly as I have written to Monterey that there is no mine, nor does there appear to be any quantity of this kind of stuff.*" Written to Monterey that the Almaden mine was no mine —when all the world knew better—and on the very day too on which he wrote to the Alcalde of San José to inspect the Almaden mine, and see into what fine order he had gotten it, and how he had discovered the true direction of its vein? Impossible.

On the back of this letter we find endorsed in pencil, "Suñol, 4½; Sainse, 4½; Peña, 4½; Narbaez, 4½; Padre, 4; Forbes, 2." These numbers add up 24—just the number of *barras* or shares into which all mines in Mexico are divided. The persons named were not the owners of the Almaden mine. The endorsement evidently refers to the actual or prospective ownership of a mine by certain persons, in certain proportions—and that mine not the Almaden.

Then there is another letter about new mines. On the seventh February, 1848, James A. Forbes writes:

ALEXANDER FORBES, ESQ.

My Dear Sir:—By the Mason I send you some specimens of the new vein, which was duly registered on Saturday, and *poso* opened; I have not had time to make an assay. Your opinion respecting the abundance of ores of cinnabar in the vicinity of New Almaden is very correct. I have this morning caused another *denuncio* to be made of another *veta!* and on my return from it I have yet another to make.

I think it highly probable that the mine of which Mr. Forbes was speaking in his letter of nineteenth January, 1848, is the same which is referred to in Governor Mason's letter to Alcalde White of the seventeenth April, 1848, (*Vide* House Ex. Doc., 1st Sess., 31st Cong. 1849-50) as having been denounced on the seventeenth December, 1847. I will give an extract:

Sir:—I received your letter of the second inst., late in the afternoon of the sixth, together with the papers which accompanied it, concerning the quicksilver mines denounced in your office on the seventeenth of December and on the fifth of February last—the former by Cook, Belden, Abrego, Ricord, and others; the latter by Pedro Sainsevain and partners—two days previous to the reception of your letter, I received one dated on the fourth inst., signed by Messrs. Abrego and Larkin, though written by Mr. Ricord, as he informed me, in which it is stated that the mine denounced on the seventeenth December was denounced by Mr. Cook, and shortly thereafter transferred to their company, and that the one denounced on the fifth of February was denounced by Jose Suñol, Abrego and Larkin—"asking for an executive order for Suñol to desist from digging within their proper limits, and that the right of Suñol to be put in possession be deferred until the creation of certain Tribunals;" and stating that the denouncement of Cook on the seventeenth of December, and that the possession obtained under it on the second of February, were prior to Suñol's denouncement, which was on the fifth of February; the other party, those interested in the denouncement of the fifth of February, claim to be the lawful and rightful owners of that mine, and demand possession of it under the fourth article, title sixth, of the Mining Laws, and assert that the party claiming under the denouncement of the seventeenth December have no right to possession, because neither their excavations nor measurements of possession were made in accordance with the requirements of the aforesaid fourth article of the Mining Laws.

I availed myself of the oportunity which a visit to your part of the country last week afforded me, to personally examine and minutely inspect and measure both of those mines, denounced on the seventeenth December, and the fifth February last; there were three excavations at the mine pointed out to me as the one denounced on the seventeenth of December, all three within a few paces of each other. In one of the excavations, over which was erected a windlass, a man named Cash was at work; and near the two excavations lowest down the hill, stood a small cabin and Mr. Taylor's tent; this was on the eleventh inst.; the deepest of these three excavations, measuring in the most favorable manner from the upper side of the hill, did not exceed fifteen feet, though one of the interested parties states that one of the excavations was of the depth required by the mining laws when possession was given, on the second of February, but that it since "caved in." I examined that spot which is said to have "caved in," with great care; it had the appearance of having been purposely filled up; it was dug in rock, not in earth; and in my mind it was as much impossible for that rock to have "caved in," as it would be for an auger-hole to "cave in" that had been bored in a large solid block of timber.

There will be found in the record several instances of the registry of mines, near New Almaden, by various persons—as by Lorenzo Pinedo, on the seventh of June, 1846, *Trans.* 816; by Bruno Valencia, on the twenty-fourth of April, 1846, *Trans.* 818; by Pedro Hernandez, on the second of March, 1846, *Trans.* 818; by Ygnacio Soto, on the thirteenth of June, 1846, *Trans.* 820; by Pedro Mesa, José Suñol, and Pedro Sainsevain, on the thirty-firsth of January, 1848, *Trans.* 3058; by Ygnacio Soto and his partners Andres Martinez and Domingo Soto, on the seventh of February, 1848, *Trans.* 3063; by Ygnacio Soto and his partners Pedro Sainsevain, José Suñol, Andres Martinez, and Domingo Soto, on the thirteenth of February, 1848, *Trans.* 3066; by José Suñol and his partners Narvaez, Sainsevain, and Sanchez, on the fifth of February, 1848, *Trans.* 3063; and no doubt many other records of registry might be found in the archives at San José.

So the Court see that there were places around New Almaden denounced as mines, that in fact were not mines. Persons in those days, as they have always done in all mining countries, would get specimens of good ores, and represent them as taken out of newly discovered veins, trying to entice the unwary into purchasing in the pretended mines. Amongst them it seems there was some spot of which Mr. Alex. Forbes had written to Monterey that it was "no mine," that he did not believe any vein of ore existed. He was afterwards surprised by the assay made by James Alex. Forbes, and said he would try the specimens he had, but did not think there was any appreciable quantity of the ore. Such was the letter of the nineteenth January, 1848.

And now as regards possession, the truth is, as we have seen, that the mine of New Almaden, with an extent of three thousand varas in every direction from its mouth, had been in the possession of Castillero, his partners, and his and their assigns, since December, 1845; and in April, 1847, Robert Walkinshaw, as the agent of Mr. Alexander Forbes, to whom Castillero, in December, 1846, had leased the two squares leagues (two sitios) of land on his mining possession, took possession of the mine, of the three thousand varas, and of the said two square leagues. We have seen how jealously the possession of these two *sitios* was guarded by James Alexander Forbes, who was temporarily in charge of the mine dur-

ing the absence of Mr. Walkinshaw, in July, 1847. This is shown in his letter of the fourteenth of that month to Mr. Alexander Forbes, in which he says: "I was presented yesterday with a splendid specimen of quicksilver ore, from a spot within or near the limits of the two leagues conceded to Castillero and *socios*. * * I immediately had an interview with the discoverers, and informed them that if any rich vein did in reality exist without the limits of the two leagues, and documents could be manifested of the denunciation, I was ready to enter into a contract in the name of the company of Almaden for working the vein; but that I could not permit any claim or operation to be entered upon, until the land should be measured."—*Exh. O. H. X. No.* 3. *Trans.* 541.

Second. I will next briefly notice the proceedings by which Mr. Alexander Forbes endeavored to procure an amended possession of the mine, and an increase of *pertenencias*. It will be remembered, that in his letter of the nineteenth of November, 1847, he states, that in the excavations he had been making across the vein to discover the value and abundance of the ores in its whole width, he had "most unexpectedly found no cinnabar whatever." This puzzles us greatly, he says, and he asks: "Can this mine be a *manto?*" His next letter, written five days later, contains the cheering information that he has at last found the vein, or *cinta*, of ores which he was looking for. To see whether this vein might not be wider below than it is above, has been, he says, "the object of our labors *since discovering the proper direction of the vein of the whole mine*, which discovery makes everything more plain. This direction was before *entirely mistaken*."

Now, it is provided by the Mining Ordinances, *Tit. IX, Art.* 10, that the Mining Deputies, accompanied by the Professor of Mines and a Notary Public, shall visit all the mines in their District at least once a year, to see that the provisions of the law relating to the security and preservation of mines, and to their proper working, are strictly observed, and to adopt means to enforce them where they are disregarded.—*Halleck's Coll.* 242.

And it is further provided by the Ordinances, *Title VIII, Art.* 11, that if it should turn out, in the progress of mining operations, that the direction of a vein had been at first mistaken, the mine owner, on application to the proper authority, may reform or

change his boundaries so as to include the vein, if such alteration would not injure his neighbor.—*Ibid*, 226.

And again, the Ordinances grant to the discoverers of a mine three *pertenencias*, and if such newly discovered mine be worked in partnership, four additional *pertenencias*, making seven in all.—*Tit. VI, Art.* 1; *Tit. XI, Art.* 2; *Ibid*, 223, 252.

Mr. Alexander Forbes having put the mine in order, and ascertained the true direction of the whole vein, addressed a petition, on the nineteenth of January, 1848, to the Alcalde Weekes, praying that he would visit the mine, inspect its works, reform the boundaries according to the true direction of the vein, correct such mistakes as might appear in the former act of possession, and decide upon the increase of *pertenencias* which might be possessed by the owners of the mine.—*Trans.* 387, 388.

Two days after this petition, that is to say, on the twenty-first of January, 1848, Alcalde Weekes, with two assisting witnesses and a practical miner, visited the mine, inspected its works, described what they conceived to be the true direction of the vein, and, considering that it was worked in partnerships, conceded to the company the right to four continuous *pertenencias* along the course of the vein; and concluded by stating that *the right and title of the mine to the land granted in the original act of possession remains valid.—Trans.* 286; *and translation*, 802.

There is one matter in the petition of Mr. Alexander Forbes to Alcalde Weekes, to an explanation of which I ask the attention of the Court. It will be perceived that Mr. Forbes requests the Alcalde to decide upon the increase of pertenencias to which the mine owners are entitled by virtue of its being worked in partnership. Upon this, the Government counsel ask: Why, if the original act of possession, dated the thirtieth of December, 1845, had been in existence in January 1848, by which the Alcalde Pico granted a mining possession of three thousand varas in every direction from the mouth of the mine, should Alexander Forbes have prayed the Alcalde to grant an increase of *pertenencias* in 1848, as provided by the ordinances? For, say they, three thousand varas, measured in every direction from the mouth of the mine, includes many more *pertenencias* than the *seven* which the law gives to a newly discovered mine when it is worked in partnership.

To which we reply: A careful examination of the Act of Possession given by Pico in 1845, discloses the fact that the Alcalde gave possession of the mine, *and also* granted to Castillero three thousand varas in every direction from the mouth of the mine. He first declares that he gives juridical possession of the mine known by the name of Santa Clara; and then, proceeding to enumerate several reasons for what follows, he grants to Castillero three thousand varas in all directions, subject to the provisions of the general Mining Ordinances on that subject. So that the giving of juridical possession of the *mine* was one act, and the granting of three thousand varas in all directions was another act, both of which were recorded in the same instrument, which is usually called the act of possession.

What, then, did he mean by the *mine*? What was its extent? Evidently, he intended by the mine such a number of *pertenencias* as the discoverer of a mine in a new hill (*cerro*) was entitled to by the ordinances—which would be *three*, if he worked the mine alone, and *seven* if he worked it in partnership with others.

The distinction between the juridical possession of the mine and the grant of three thousand varas, is very explicitly stated by Castillero in his proposals to the *Junta de Fomento* on the twelfth of May, 1846. There he says: "Wherefore, I have denounced and taken possession, not only of the said mine called Santa Clara, but also of an extent of three thousand varas in all directions from the said place."

José Castro, in the power of attorney which he gave McNamara in Monterey, on the twelfth of June, 1846, speaks of "the powers which my partners have granted to me, for the purpose of executing every contract which may offer in regard to the three *pertenencias*, which by just title, and as discoverers, we possess in the quicksilver mine situated in the district of Santa Clara." It thus appears that Castro thought that he and his partners, as discoverers, were entitled to a mine consisting of three *pertenencias*. They were mistaken. They were entitled to *seven pertenencias*.

In the contract of *avio*, or lease of the mine, which Mr. McNamara made under that power with Alexander Forbes in Tepic, on the twenty-eighth of November, 1846, the mine is said to embrace three *pertenencias*.

When Castillero ratified this contract in the City of Mexico, in his recital of Castro's power of attorney to McNamara, and of the contract of *avio*, made in pursuance of it, he speaks of three *per tenencias* only. His silence in regard to any other and larger claim amounts to nothing; for he was only called on to ratify what had been already done. He was under no obligation to do that even. And he might well have supposed that, whatever number of *pertenencias* the mine included, three would be as many as the company could work in the sixteen years of their term. It is in proof that they have scarcely exceeded the limits of one *pertenencia*. [*Day's Dep., Trans.* 1097.] In the instrument of sale of five *barras* to Alexander Forbes, executed by Castillero on the same day with that in which he ratified the contract of *avio*, nothing is said of the number of *pertenencias* of which the mine consisted. He merely declares that he is the owner of twelve shares in the mine, and that he "sells to Mr. Alexander Forbes five shares of the twelve which belong to him in fee in the aforesaid mine of Santa Clara."—*Trans.* 2505.

The same distinction between the juridical possession of the mine, and the grant of three thousand varas, as set forth in the record of possession given by Pico in 1845, is expressed by James Alexander Forbes in his letter of the fifth of May, 1847, where he advises his correspondent to obtain from the Supreme Government "the unqualified ratification of the juridical possession which was given of the mine by the local authorities of this jurisdiction, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverers." And in his deposition, in answer to questions by the Government's counsel, he says, that besides the amended possession given by Weekes in 1848, he never knew any other possession to have been given, except that given by Pico in 1845. "This embraced three *pertenencias*, so far as regarded the mine. Three *pertenencias*, and also the lands about the *hacienda*, I understood to have been given to Castillero in 1845. I understood that three thousand varas were granted about the *hacienda*. I think I learnt it about the time I received possession from Real."—*Trans.* 455, 456.

The deed from the Robles brothers to J. A. Forbes conveys to him two of their *barras* in each of the three *pertenencias* of the

the mine. [*Trans.* 172.] This conveyance, says James Alex. Forbes, in its terms "comprises everything—all their right, title and interest in the lands and mine. By Mexican custom, a sale of *barras* in a mine includes an interest in the *hacienda*."—*Trans.* 456.

The *Junta de Fomento*, in their letter of the fourteenth of May, 1846, to the Minister of Justice, inclosing Castillero's proposals, and recommending their acceptance by the Supreme Government, say in reference to his seventh proposition, that it is necessary to consider that Castillero has in his favor "the qualification of being discoverer *of an absolutely new hill, in which there was no mine open;* and to such there is granted, in the first article of the sixth title, *three pertenencias, either continuous or interrupted; and if he shall have discovered other veins, one (pertenencia) in each of them.* He has also in his favor the circumstance that he works it in company with others, to whom there is granted that, without prejudice to the right which they may have by the title of discoverers, when they are such, they may denounce four new *pertenencias*. —*Trans.* 1168.

In the supposition by some of the interested parties—Mr. Alexander Forbes in the number—that the mine of which juridical possession was given by Pico in December, 1845, contained three *pertenencias*, there is nothing inconsistent with the record of that act of possession offered in evidence by us. In truth, the very circumstances which are urged by the counsel for the Government as impeaching that record, establish its genuineness beyond question.

As I have alluded to Alexander Forbes' petition to Alcalde Weekes, solely for the purpose of showing that it does not tend in the least to discredit the record of the former act of possession in 1845, I will satisfy myself on this point by calling attention to the concluding part of the record of Weekes' proceedings on that petition, where he refers to the former act of possession in these words: "*Siendo constante el derecho y titulo de la mina á la gracia de tereno concedido en la originál acto de posesion*,"—THE RIGHT AND TITLE OF THE MINE TO THE LAND GRANTED AS A REWARD IN THE ORIGINAL ACT OF POSSESSION REMAINING VALID.

Now, the Mr. Weekes who signed that record has been twice called by the Government in this case, and the Government have

proved by him that he saw a little paper book in the Alcalde's office at San José, while Burton was Alcalde, containing a record of the denouncement of this mine by Castillero, and of the juridical possession of it which had been given by Pico in 1845. He declares, further, when he is shown the original papers of denouncement and possession offered in evidence by the claimant, that he believes them to be the same little paper book that he saw when Burton was Alcalde, and which he subsequently saw in the archives of his office when he was himself Alcalde in 1848. [*Trans.* 307.] Burton was elected Alcalde in October or November, 1846. [*Trans.* 745; Murphy's *Dep. ans.* 61.] When, therefore, the witness in 1848 refers to the original act of possession of the mine, and to the grant of land which had been made in that act, the conclusion is irresistible that he meant the act of possession given by Pico on the thirtieth of December, 1845, and the three thousand vara grant therein made. So much for Weekes' possession.

Third. We now come to the survey of the two-league grant. Our information concerning it is derived from the correspondence between the two Forbes, and the testimony of Mr. Lyman, the surveyor who made it. As it has little or no bearing on any question in the case, a brief allusion to it will be all that is necessary.

The only letters that allude to the subject are two from James Alexander Forbes to Alexander Forbes; they are dated respectively the seventh and seventeenth of February, 1848. In the first of these, the writer says: "I have spoken to Mr. Lyman upon the subject of this survey, and he very willingly agreed to go and see you to-morrow. I shall go to the *hacienda* to-morrow, (Wednesday) in order to assist, if you resolve upon the measurement before you proceed to Monterey. My opinion of the title of the widow Berreyesa, or rather my first view of that title, and the information given by her sons, was that the grant was for two leagues; but I have been at her house on my return hither, and I find that the title was given for one league, or *sitio*, and that the word one has been converted into the word two. I advise you of this in order to prevent an incorrect supposition of her boundary line. The correctness of the title can only be ascertained by examining the archives at Monterey. Mr. Lyman tells me that he did not survey Cook's land, although he, Cook, had made some proposition to him

to do it. Perhaps it would be safe to take the limit of Cook, and the prolongation of that line as one of the limits of the two *sitios*, without meddling with the widow's land or boundary, but you know that she expects to have some line defined between her land and those two *sitios* of the *hacienda*, and will therefore determine as to that operation." In this letter it will be noted that James Alexander Forbes again refers to the grant of two *sitios*.—*Trans.* 543.

The last letter, as it is short, I give entire:

BERREYESA'S FARM, Feb. 17th, 1848.

My Dear Sir:—The widow has agreed to have the line of demarcation between the *sitios* of the mine and her land, to be traced upon the summit of the second hill from her plain, (upon which one of her sons is now gone to put up a white flag in a tree) and to run along that ridge down to the stream near the road which the said line will cross, and skirting along the base of the hills near the plain, until it reaches Cook's line or boundary. This measure will take in the greater part of the *Cañada*, and I think that it will be very near the line you pointed out to Mr. Lyman.

The widow has desired me to state to you that she wishes to have her land measured as follows: one league upon the line of division between herself and Cook, and a parallel line to be run to that between her land and the Bernales; but that if you are desirous to have the strip from the point of the hill towards the *lomita* near Cook's, that she is willing to arrange the matter of purchase with you, and will be glad for you to make her an offer for that part of it.

I am, my dear sir,
Your obedient servant,
JAMES ALEX. FORBES.

Alex. Forbes, Esq., New Almaden.
[*Trans.* 547.]

The Mr. Lyman who is mentioned in the first of the foregoing letters, actually made the survey. His deposition was taken in this case before the Land Commission on the eighteenth of February, 1854. He says: "I made such a survey in the month of February, 1848, at the request of James Alex. Forbes of California, and Alexander Forbes of Tepic, in Mexico, who was at that time at said mine. At the time the survey was made I held a commission from General Mason, who was then Governor of California, as surveyor for the Middle Department of California, which embraced

what is now Santa Clara County. I was requested to lay out two square leagues of land, and was shown either a grant or a copy of a grant from the Mexican Government for two square leagues. These were to be laid out so as to cover certain mining rights, called *pertenencias*, which extended three thousand varas in each direction from the mouth of the mine. I made the survey by triangulation, and it was so made as to include two square leagues in a somewhat irregular shape, approximating a rectangle, and it was so surveyed as to have the mouth of the mine as near in the centre as could be, without covering land of the neighboring *ranchos* claimed by individual owners. If there had been no surrounding claims it could have been laid out with the mouth of the mine in the centre.

"The line, as actually run by me on the portion adjoining San Vicente, was one which was agreed upon at the time of compromise between said Forbes and the Berreyesa family. I was, at the same time when this survey was being made, requested by the widow Berreysea to make a survey of the Rancho San Vicente. I made, in fact, both surveys at the same time, and one of her sons went with me and pointed out the boundaries which they claimed. The line above mentioned as agreed upon, was made the boundary between the two."—*Trans.* 11–12.

Fourth. The fourth and last of Mr. Alexander Forbes' transactions, while he was in California, relating to the mine, was his attempt to purchase from the Robles brothers their remaining interest of two *barras*. They originally owned four *barras*, two of which, as far back as September, 1846, they had sold or agreed to sell to James Alexander Forbes, but did not convey to him by written instrument until the fourteenth of September, 1847. The negotiation was conducted with James Alexander Forbes, the attorney in fact of the two Robles. The transaction derives its sole importance from the circumstance that, in the course of the treaty for the purchase of this interest, it is alleged by the Government that Mr. Alexander Forbes wrote a letter on the twenty-eighth of March, 1848, to James Alexander Forbes, in which he discloses that "in fact, the documents procured by Castillero, in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans."—*Exh. X., Birnie's Dep. Trans.* 864.

The existence and contents of the original letter containing this

declaration, the Government have attempted to prove by James Alexander Forbes and Robert Birnie. The loss of it they endeavor to prove by the former, who has testified that it was stolen from his carpet-bag, in a hotel in San Francisco, on the thirtieth of June, 1858. [*Trans.* 869, *ans.* 14.] Just at this place I do not propose to discuss the testimony bearing on this alleged original letter, further than to note the following facts, viz: that on the ninth of August, 1850, James Alexander Forbes sold one of his two *barras* to Mr. John Parrott, of San Francisco, for the sum of twenty-four thousand dollars [*Trans.* 179]; that on the twenty-ninth of May, 1855, he sold his remaining *barra* to Mr. William E. Barron, of San Francisco, for the sum of thirty thousand dollars [*Trans.* 189]; that on the eleventh of February, 1856, he filed an answer to the complaint of James Tobin *et al.* v. Robert Walkinshaw *et al.*, (a suit instituted on the equity side of the United States Circuit Court for the Districts of California) in which he sets up in defense, among other things, the two-league grant from the Supreme Government of Mexico to Andres Castillero, as set forth in the decree signed by Castillo Lanzas on the twenty-third of May, 1846, and swore it was a genuine document [*Trans.* 473]; that in November, 1856, he instituted proceedings in bankruptcy in the District Court for the Third Judicial District of California, and procured his discharge in January, 1857 [*Trans.* 475]; that after he became a bankrupt he applied to Bolton, Barron & Co., part owners in the mine, and the agents of the New Almaden Company, for the loan of ten thousand dollars, and was refused it [*Trans.* 475]; that just about that time, and in consequence of such refusal, he sold to Henry Laurencel and James Eldridge, the owners of Justo Larios' title, for the sum of twenty thousand dollars, the use of certain papers supposed to be adverse to Castillero's title, in order to enable them to compromise with the New Almaden Company [*Trans.* 368, 467]; that a compromise was attempted by Laurencel and Eldridge, in which, after having exhibited the papers to John Parrott, one of the owners of the mine, they failed [*Trans.* 379, 380]; that the said papers were offered in evidence in this case by the Government, and James Alexander Forbes called as a witness to prove them, on the fourteenth of December, 1857; that the sole tendency of his testimony, and of the said papers, and the manifest object for which

he was called and they introduced, *was to prove that the title papers of Castillero, obtained from the Supreme Government, were made after the month of April*, 1849; that in consequence of the aspersions thus attempted to be cast on their title, the claimants moved, in February, 1858, for a commission to Mexico to examine witnesses in support of it, and said motion having been substantially denied by the Court for want of power under the Act of 1851, they next endeavored to have the law so amended as to confer such power on the Court; that in said attempt they failed through the interference of the U. S. District Attorney and the Attorney General, in the Judiciary Committees of Congress; that the claimant, having, subsequently to James Alexander Forbes' said examination, received from Tepic a letter of his to Alexander Forbes, written on the fifth of May, 1847, whereby it is proved that he had seen, critically examined, and commented upon the title offered in evidence by the claimant, before the fifth of May 1847, recalled him for further examination on the thirtieth of June, 1858, and proved said letter by him [*Trans.* 837]; that the whole effect, tendency and value of his first deposition, and of the documents sold by him to Laurencel and Eldredge for twenty thousand dollars, was thus destroyed by his letter of the fifth of May, 1847; that in consequence thereof, and emboldened by the zealous and successful efforts of the certain officers of the Government in preventing a fair legal investigation of the facts of this case, and believing it wholly impracticable for the claimants to procure the attendance of witnesses from Mexico, between the fourth and tenth of July, 1858, he and Laurencel were much together, and conspired to fabricate a false document to retrieve their fortunes; that accordingly, on the sixteenth of July, 1858, he is called again on behalf of the Government, and testifies to the existence, loss, and copy of the alleged letter of the twenty-eighth of March, 1848, in which Alexander Forbes is made to declare that all of Castillero's title papers to the mine and lands of New Almaden, from the Supreme Government, were made long after the Americans took possession of California; that on his cross-examination he confessed that in making the answer in equity, above referred to, he had perjured himself [*Trans.* 935]; that ten of the most respectable gentlemen in his county, his neighbors, have testified that they would not believe him on his oath; and that he has not produced a

single witness to sustain his character, which has remained thus impeached since August, 1858.—[*Depos. of Wm. Aram, Wm. L. Smith, H. C. Melone, W. McCutchan, Felix Raney, Asa Vestal, Isaac Branham, F. Lewis, Thomas Campbell, and L. C. Bostick.* —*Trans.* 960–995.

Of Robert Birnie, the witness who is called in aid of James Alexander Forbes in this matter, all I desire to say at present is, that by the testimony of his coadjutor, Forbes, he is convicted of an important and direct falsehood in his deposition. Forbes, whose deposition was taken after Birnie's, would no doubt have borne him out in the lie, had it not been for the U. S. Marshal, who was cognizant of the fact, as Forbes well knew, which Birnie denied. Birnie, I will add, has been impeached by a large number of wealthy and respectable citizens of Martinez, old neighbors, and the principal men in their county. These are Col. A. J. Coffee, Judge F. M. Warmcastle, Mr. David Boss, Mr. Nathaniel Jones, Mr. Nicholas Hunsaker, Mr. Beverly R. Holliday, Mr. Elam Brown, Mr. Daniel Small, Mr. Calvin Boss, Mr. Edwin Baldwin, Mr. W. V. Higgins, Mr. Matthew R. Barber, Mr. James L. Swaney, Mr. William Ford, Mr. Daniel Hunsaker, Mr. Edward Lee, Mr. John Sturgis and Mr. Henry Matthews.—*Trans.* 2755–2802.

But Mr. Alexander Forbes really did endeavor to purchase the two *barras* of the Robles from J. A. Forbes, and offered $6,000 for them, as shown by the correspondence between him and J. A. Forbes, while he was in Monterey, just previous to his departure from California. The letters relating to this negotiation are the following: *first*, a copy, in the handwriting of Alex. Forbes, of a letter addressed by him on the twentieth of March, 1848, to J. A. Forbes, offering him $6,000 for the two *barras* of the Robles; *second*, J. A. Forbes' reply, from Santa Clara, on the twenty-second of March, 1848, declining the offer, I presume; *third*, a copy of a letter, in Alexander Forbes' handwriting, dated Monterey, twenty-fifth of March, 1848, addressed to J. A. Forbes, replying to his letter of the twenty-second of March, 1848. These will be found in the *Transcript*, on pages 954, 955, 956.

The letter of the twenty-fifth of March, 1848, is evidently the raw material out of which J. A. Forbes fabricated the alleged letter of the twenty-eighth of March, 1848, a copy of which was so

providentially made by Birnie. Their points of similarity I do not propose to show at this stage of the argument. I have alluded to the fabricated letter of the twenty-eighth of March, 1848, for the purpose of showing in what connection it stands with other facts in the history of the case; what a stranger it is among them; and from what a villainous source it emanates.

This concludes the history of Mr. Alexander Forbes' transactions in California.

PART FIFTH.

FROM MARCH, 1848, TO NOVEMBER, 1849, WHEN JAMES ALEXANDER FORBES RECEIVED THE NOTARIAL COPY OF THE CASTILLO LANZAS TWO-LEAGUE GRANT.

I. Mr. Walkinshaw and Don Manuel Diaz are mentioned by Mr. Alexander Forbes, in his said letter of the twenty-fifth of March, 1848, as the persons who, after his departure, will wait on J. A. Forbes about the matter of the purchase of the Robles *barras*. Unsuccessful in negotiating the purchase for his principal upon the terms authorized, which I presume were the same offered by Mr. Alexander Forbes ($6,000) Mr. Walkinshaw, on the fourteenth of April, 1848, bought them himself for the sum of $7,000. —*Trans.* 173.

I omitted to mention, that while Mr. Alexander Forbes was in California, to wit: on the twenty-seventh of December, 1847, (*Trans.* 149) he purchased three of the four *barras* which, by the articles of partnership, Castillero had given to Padre Real on the second of November, 1845; the Padre, on the tenth of June, 1846, had conveyed the fourth to Eugene McNamara. The conveyance to Mr. Alexander Forbes is made in the name of Andres Castillero, by Padre Real as his attorney in fact. The consideration was $4,500.

It is perfectly certain that the first letter from James A. Forbes to Mr. Alexander Forbes, written after the departure of the latter from California, is that of the twenty-eighth of June, 1848. It begins with these words: "Shortly after your departure from Mon-

terey, Mr. Walkinshaw and Don Manuel Diaz made proposals to me in your name for the purchase of the four *barras* or shares in the mine of New Almaden de Santa Clara, of which I am the agent on the part of the Messrs. Robles. The offer made by your agent for those shares not being equivalent to their present or future value, I have declined entering into any negotiation for their disposal."—*Trans.* 957.

Here we may note the strange circumstance, that although as far back as September, 1846, James A. Forbes had purchased from the Robles two of their *barras*, which were conveyed to him by them on the fourteenth of September, 1847; and although on the fourteenth of April, 1848, as the agent of the Robles, he had conveyed to Walkinshaw their two remaining *barras* for $7,000, yet on the twenty-eighth of June, 1848, when the Robles had no interest in the mine, he says to Mr. Alexander Forbes: "Having at present a due sense of the nature of my position as the agent for the shares of the Messrs. Robles, and also of that of your position as *habilitador* and part owner of the mine, permit me to call your attention to the following observations." He then proceeds to charge Mr. Alex. Forbes with having procured the contract of *avio* fraudulently, by collusion with McNamara—declares that he will institute legal proceedings to have the contract set aside, and calls upon Mr. Alex. Forbes to appoint an agent to defend his interest in the approaching litigation. This letter is filled with complaint. It resumes and continues the old quarrel. It is thoroughly malignant and revengeful. Its only business is scolding and threatening. But strange to say, Mr. James Alexander Forbes—so zealous, so touchy, so sensitive, so combative, so tenacious in matters of property, alludes not in any manner to the terrible declaration in Alexander Forbes' letter of the twenty-eighth of March, 1848. How is it possible to account for such silence? The answer is easy. Such a letter was never written—such a declaration never made.

II. The next important event in the history of the mine is the visit of James Alexander Forbes to Tepic, for which place he left San Francisco on or about the first of May, 1849. He returned to California about the thirteenth of June in that year.—*Transcript*, 435.

While he was in Tepic, to wit: on the twenty-seventh of May, 1849, he made out a memorandum of such documents as should be obtained by Castillero from the Supreme Government for a grant of lands and for a confirmation of the mining possession, and recommended that they should be ante-dated. This is known as the Tepic memorandum.—*Trans.* 391, 437.

It makes substantially the same suggestions as were contained in his letter of the fifth of May, 1847, except that the Tepic memorandum specifies with particularity the boundaries to be named in the grant.

A careful examination of this Tepic memorandum, and of the letters in the correspondence which refer to it, have satisfied me that the whole thing is a forgery; for it will be found that it is referred to only in copies of letters purporting to have been written by J. A. Forbes to the parties in Mexico. The same suggestions are made for the first time on the twenty-eighth of October, 1849, in a letter to Barron, Forbes & Co., of Tepic, the original of which is offered by claimant, and proved by J. A. Forbes to have been written by himself. (*Trans.* 837, 845.) The original of this letter the claimant did not have in San Francisco when J. A. Forbes was first examined. Forbes then produced a copy of a letter purporting to have been written by himself to Barron, Forbes & Co., on the twenty-eighth of October, 1849—the same date with the original offered by us. This copy is clearly a forgery. It will be found in the Transcript, p. 392.

So far as the tendency of this correspondence is to prove that any of our title papers were made after, and in consequence of the Tepic memorandum of the twenty-seventh of May, 1849, it is not in the least unfavorably affected by the Tepic memorandum, or by any statement of J. A. Forbes contained in what he declares to be copies of letters addressed by him to parties in Mexico. Indeed, his statements in such alleged copies are decidedly favorable to the cause of the claimant, for they consist principally in complaints that nothing has been done to carry his suggestions into execution, in a repetition of what he conceives to be the legal defects in the genuine grant, and in urgent entreaties that the desired documents might be procured and sent to him. So far as their mere contents are concerned, they are valuable documents for the claimant.

But as bearing on the character of the witness, and as proving the facility with which he takes up a genuine letter, and manufactures a false one out of it, the evident forgery of the letter of the twenty-eighth of October, 1849, is very important. Out of the genuine letter of that date he fabricates what he says is a copy of the original letter addressed to Barron, Forbes & Co.; just as he manufactured out of the genuine letter addressed to him by Alexander Forbes, on the twenty-fifth of March, 1848, the alleged original of the twenty-eighth of that month, which he says was stolen from him.

III. On the twenty-third of April, 1849, Mr. Alex. Forbes, for himself and in the name of the company, appointed James Alexander Forbes their agent, to demand and take possession of the mine and *Hacienda*, and to manage and conduct the operations of the establishment.—*Trans.* 435, 510.

Shortly after J. A. Forbes' return to California from Tepic, that is, in October, 1849, a very bitter litigation arose between himself and Robert Walkinshaw, concerning the right of possession of the mine—Forbes claiming the right of possession under the power of attorney of the twenty-third of April, 1849, Walkinshaw denying his right under that power, and claiming it for himself under the authority conferred upon him when he first took possession in 1847.

Into the particulars of this litigation I do not propose to enter. It was very bitter, but fortunately very short. It began in September and ended in October, 1849. The first order was issued by R. M. May, Judge of First Instance and Alcalde of San José, on the twenty-fifth of September, to the effect that James Alexander Forbes, and all persons acting under his command, do absolutely desist from interrupting, or in any way entering upon, the possession of the said mine without license of the said Robert Walkinshaw; or from carrying away any part of the said ores or other property pertaining thereto; or in any other manner trespassing upon the property in said Walkinshaw's possession.—*Trans.* 281.

A few days afterwards Mr. Walkinshaw presented a petition to the same R. M. May, complaining that J. A. Forbes had disobeyed the order of the twenty-fifth of September, and praying for compulsory measures against him. Accordingly, on the ninth of Octo-

ber, 1849, Judge May issued another order directing the Sheriff to remove Forbes, and all persons acting under his orders, from the premises, and to arrest him; all of which was done on the same day, except the arrest.—*Trans.* 282, 283.

On the twentieth of October, 1849, James A. Forbes filed in these proceedings the following affidavit, which, as showing the position of the litigants to each other, and to their common constituents, I give in full:

IN THE COURT OF FIRST INSTANCE,
PUEBLO DE SAN JOSE,
R. M. MAY, Judge.

ROBERT WALKINSHAW,
v.
JAMES ALEX. FORBES.

James Alexander Forbes, defendant in the above suit, being duly sworn, deposes and says:

That the allegations in plaintiff's petition and affidavit that he (plaintiff) is and has been in peaceable possession of the mine and ores of New Almaden since the month of April, 1847, and that affiant is threatening illegally to interrupt his said possession, are wholly false.

That true it is, that in the said month the plaintiff took possession of the said mine, by virtue of a power of attorney given him as agent by Alexander Forbes, of the city of Tepic, Mexico, the principal owner and sole *habilitador*, or authorized contractor for the working of the said mine, and that the said plaintiff, by virtue alone of said power, continued to work the said mine as the agent of the said Alex. Forbes, and in his name, until the month of August, 1849.

That on April 23d, 1849, the said Alex. Forbes, by public and notarial act passed at the said city of Tepic, revoked all authority previously given to the plaintiff as his attorney in fact to work the said mine, and empowered affiant as his agent, to take possession of, administer and elaborate the same; that on the arrival of affiant, about August 10th, 1849, he exhibited the said notarial act and power to plaintiff, in the presence of R. H. Dimmick, Esq., (now of San Francisco) and the plaintiff acknowledged the same to be correct, and that said Alex. Forbes had full power to execute the same; and that the plaintiff thereupon, or immediately after, in acknowledgment of the revocation of his powers, voluntarily and peaceably delivered to affiant the full, legal and actual possession of said mine and its appurtenances.

That this affiant, by virtue of the power of attorney aforesaid, remained in peaceable, public and uninterrupted possession of the said mine and appurtenances, and continued working the same with the knowledge and consent of the plaintiff until September 25th, 1849, when the said plaintiff, without any notice or citation whatever to this affiant, obtained an order from the Court of First Instance of San José, declaring him, the said plaintiff, to be the legal possessor of the said mine, and ordering this affiant to refrain from interfering with the possession thereof without license from the said plaintiff; that affiant protested against the proceedings as unjust and *ex parte*, whereupon, on October 8th, 1849, the said Court, without any notice to affiant, issued another order, commanding the Sheriff to remove this affiant and the persons in his employment from the said mine, and to arrest this affiant; that this affiant being thus forcibly and illegally ousted from his possession, presented a petition to Peter H. Burnett, President of the Superior Tribunal, praying that the said illegal orders should be suspended and affiant placed in his former possession; whereupon the said Burnett ordered the said R. M. May, Judge of First Instance, to place this affiant in his former possession of the said mine, ores, etc., and that the case should remain in this situation; that is, that affiant should have full and peaceable possession thereof as formerly, until the appeal taken by affiant from the said illegal orders should be decided by the Court above; that the said R. M. May issued his order on the nineteenth day of October, commanding the Sheriff to place affiant in possession, in accordance with the said order; but that on the eighteenth, and as affiant is informed, on the twenty-first of October, the said May issued a counter-order, in direct disobedience and entire reversal of the order of Judge Burnett, whereby he again recognized the said Walkinshaw as the actual possessor of the said mine and appurtenances, and ordered this affiant, without citation, notice or hearing whatever, to refrain from interfering with the said mines, without the license of the said Walkinshaw, until the final decision of this suit, thereby changing and reversing a situation, ordered to remain the same by Judge Burnett until the decision of the appeal; that this suit is between the same parties, brought upon the same allegations, contemplates the same objects, and is accompanied by the same order as that upon which the two first orders were issued and countermanded by Judge Burnett, and which is now pending in the Superior Court on the appeal of this affiant.

And now affiant deposes, that himself as part owner, and the parties for whom he is the legal agent, will suffer great and irreparable injury if these illegal and *ex parte* proceedings be continued; that Horace Hawes, the attorney of the said Walkinshaw in this and the

aforesaid suits, and pretending to act therein for the interest of his client, denounced the said mine in his own proper name on October 6th, 1849; thus seeking not only to deprive this affiant and those to whom he is responsible as agent, of all right and title thereto, but apparently striving to divest his own client, Walkinshaw, of his entire right of ownership therein; that this denouncement by said Hawes, made with the knowledge and connivance of his client, who now owns but two shares in the said mine, and accompanied by statements the most false, and proceedings the most arbitrary, has induced this affiant to believe that a fraudulent conspiracy exists between the said Hawes and Walkinshaw, with others, to deprive this affiant, and those for whom he is acting as agent, of their just rights of ownership in and to the said mines; and that it is to effect this fraud and conspiracy, that the said Walkinshaw and his attorney are attempting to oust this affiant in this arbitrary and illegal manner. Of the truth of all which this affiant most solemnly swears.

And affiant further deposes and says, that the bond given by the plaintiff, and which pretends to secure this affiant against all damage, is wholly insufficient; that it is signed by, as affiant believes, an irresponsible foreigner, who is not and does not claim to be a citizen of the United States, who has no property, as affiant believes, sufficient to secure the amount of the bond. Nor does this affiant believe his principal to possess that solvency necessary to secure him against the probable injury resulting from the order aforesaid.

JAS. ALEX. FORBES.

Sworn to and subscribed before me, this twentieth day of October, 1849, at San José.

H. C. MELONE,
Clerk of Court of First Instance.

Filed October 22d, 1849.

[*Transcript*, 275, 276, 277.]

The upshot of the affair was, that James Alexander Forbes was put in possession of the mine and *Hacienda*, about the end of October or beginning of November, 1849, and Walkinshaw was defeated.

IV. In these proceedings, Horace Hawes, Esq., was the attorney of Mr. Walkinshaw; and while they were pending, to wit: on the sixth of October, 1849, he filed before the same R. M. May his petition in denouncement of the mine. To use his own words, he "solemnly denounces for desertion the quicksilver mine situated in

the said District of San José Guadalupe, and in the lands of the Rancho of José Reyes Berreyesa, within this jurisdiction—known in its original title of registry as that of Santa Clara, and now by the name of New Almaden—the same having been left by its possessors without having been worked for four consecutive months, by which act itself they lost all right to the said mine, as declared by art. 13, tit. 9, of said *Ordenanzas of Mineria*, of which mine, so far as known, the last possessors were Andres Castillero, a citizen of Mexico; Alexander Forbes, a British subject, resident in the city of Tepic in the republic of Mexico; James Alexander Forbes, residing at Santa Clara within this jurisdiction; Robert Walkinshaw, residing at the said mine; Theodore Robles and Secundino Robles, natives of California, residing in the neighborhood of the Mission of Santa Clara," etc.—*Trans.* 287.

On the day the petition was filed, the Alcalde ordered notices of it to he posted up in public places, and to be served personally on the parties defendant. [*Trans.* 288.] On the twenty-sixth of October, 1849, the Sheriff made return of service of notice on Robert Walkinshaw, James Alexander Forbes and Secundino Robles. [*Trans.* 290.] On the twenty-second of the same month, James Alex. Forbes, for himself and for Mr. Alex. Forbes, of Tepic, answered the petition in denouncement, wherein they aver that the respondent James Alex. Forbes, "by virtue of his agency, received the possession of the said mine and its appurtenances about the tenth day of August last, and worked the same with great industry and activity until the ninth day of October instant, when this respondent was forcibly ejected from the possession of said mine and appurtenances, under color of a certain *ex parte* order, made by the Judge of First Instance of the District of San José, on the petition of Robert Walkinshaw, for whom the said Horace Hawes acted as counsel and attorney in said matter, which said order has since been appealed from and superseded."—*Trans.* 291.

And they further aver, "that the said Horace Hawes has filed the said denouncement in bad faith, and that he has unjustly conspired with Robert Walkinshaw therein named, and who is a shareholder in said mine, for the purpose of defrauding the other shareholders of their interest in the said mine, and of obtaining possession and control over the same. That in order to accomplish the object of

such conspiracy, the said Robert Walkinshaw, falsely and fraudulently pretending to be in actual possession of the same, has, through the instrumentality, aid and connivance of the said Hawes, applied for and obtained against this respondent James Alexander Forbes, repeated *ex parte* orders from the said Judge May for the delivery of possession of said mine to said Walkinshaw. That the said Hawes is thus ostensibly engaged on the one hand in vindicating the pretended claims of the said Walkinshaw to the said mine, and on the other in endeavoring to subvert, defeat and annul any right or interest he claims therein."—*Trans.* 291, 292.

And they conclude with the averment, "that for two years and upwards, immediately prior to the tenth day of August last, the the said Walkinshaw had charge of the said mine, the ores, and other property thereof, and that if there was any neglect in regard to the working thereof, it was the neglect of the said Walkinshaw, who is now conspiring with said Hawes to profit thereby, to the great injury of these respondents and of the other persons interested in said mine."—*Trans.* 292.

It is worthy of remark that Mr. Walkinshaw did not make answer to Hawes' petition in denouncement, and appears to have done nothing in defense.

On the twelfth of November, 1849, the defendants Alexander and James Alexander Forbes amend their answer, by taking exception to the jurisdiction of the Court "*ratione materiæ*," [*Trans.* 295] which exception it appears was sustained; for on the fifteenth of November, 1849, Mr. Hawes filed a protest against the refusal of the Court to permit evidence to be given of the abandonment of the mine, and of its insufficient registry in the first instance, both of which facts he declares he stands "ready here in Court to prove with the witnesses, records and documents."—*Trans.* 299.

V. For the record of the proceedings in the suit of Robert Walkinshaw against J. A. Forbes, in their contest for the possession of the mine, and for the record of Mr. Hawes' proceedings in the denouncement of the mine for abandonment, we are indebted to the Government, by whom they are offered in evidence. The object for which they are offered as stated by the Goverment's special counsel, is to show that, in neither of those proceedings was the

record of the *espediente* of registry and possession offered in evidence by any party, from which he concludes that such a record did not exist at that time in the archives of the *Alcalde* at San José. If the Government's special counsel had examined these records carefully, he would have seen that in Mr. Walkinshaw's petition of the eighteenth of October, 1849, he claims the right to possess the mine in virtue of his ownership of one-eighth part thereof, "*by title derived under the original act of registry;*" and also because he had been in possession of the mine since April, 1847, with the consent and agreement of all parties interested in it.—*Trans.* 272.

Nor could the counsel for the Government have failed to note, that in James Alexander Forbes' answer to Walkinshaw's said petition, admitting the plaintiff's former possession, he alleges that it was taken and held by plaintiff as the agent of the lessee of the mine, Mr. Alexander Forbes, of Tepic, who, on the twenty-third of April, 1849, had revoked all powers theretofore conferred on plaintiff, and vested the same in him, the defendant, whereby he, James Alexander Forbes, became entitled to the possession of the mine.—*Trans.* 275.

In this proceeding, therefore, the *espediente* of the registry and possession of the mine had no place. Both parties claimed title under it. Nothing which was denied by either party could have been proved by it. It would have been very strange indeed if it had been offered in evidence, by either party, for any purpose. Walkinshaw's particular ground for claiming the agency of the mine is shown in Forbes' letter to Alexander Forbes, of the thirtieth of October, 1849, where he says: "In one of my precited letters, I requested you to send me a certified power of attorney from Barron, Forbes & Co. to you, authorizing you as the representative of the *Compania de Avio* to appoint other attorneys in fact under you. The object of this is to be able to refute the allegations of the lawyer of Walkinshaw that you had no power to authorize me to take charge of the mine."—*Trans.* 394.

The record of Mr. Hawes' proceedings in denouncement of the mine, like that of the suit between Walkinshaw and Forbes, for the possession of it, but still more strongly, tends to prove the existence of the record of registry and possession. A *denouncement* of a mine necessarily presupposes an original registry of it, giving a

property in it to some person who has forfeited his right to it by failing to comply with the conditions prescribed by the *ordenanzas*. In Mr. Hawes' proceedings in denouncement, and in the notices and proclamations attending them, the original registry of the mine is frequently referred to, and described with considerable minuteness. So far as the description goes, it applies with perfect accuracy to the record of the registry produced by the claimant, and identifies it with reasonable certainty. That the record of registry and possession should not have been offered in evidence by Mr. Hawes in these proceedings was a matter of necessity; for although he stood (as he says in his protest) ready in Court to prove the abandonment of the mine, and to establish the insufficiency of its original registry, by means of *witnesses, records and documents*, the Court would not receive evidence on either point.

Now, what *records* could Mr. Hawes, on the fifteenth of November, 1849, in the *Alcalde's* Court, have stood ready with to prove any matter relating to the abandonment of the mine and its insufficient registry, if not the record of the original registry and possession of the mine. When he and Walkinshaw were waging this war against the owners of the mine, not four years had elapsed since its discovery and registry, since Andres Castillero had publicly been placed in possession of it by the *Alcalde*, in the presence of existing witnesses, and several other persons who attended the ceremony, all of whom were then living in and about San José.

Mr. Walkinshaw himself, although the owner of one-twelfth of the mine by title derived from Castillero, was beyond doubt interterested with Mr. Hawes in the denouncement of the mine, and would have acquired a much larger interest in it if that proceeding could have been successfully maintained. It was therefore to his interest to have made known to the denouncer any fact tending to show that the papers relating to the original registry and possession of the mine, purporting to have been made in 1845, were really fabricated in 1848. If such had been the case, Mr. Walkinshaw must have known it. But it will be perceived that throughout this whole proceeding in denouncement, Mr. Hawes, while frequently referring to the original registry, relies on the abandonment of the mine, and on the insufficency of that particular registry.

VI. While the title of James Alexander Forbes, and that of his principals, was thus attacked by Mr. Walkinshaw, who claimed possession of the mine, and by Mr. Hawes, who in conjunction with Walkinshaw had denounced it for abandonment, a new danger presented itself in the attempt of Mr. Theodore Shillaber to purchase that part of the Berreyesa *Rancho* which was supposed to include the mine, with a view of asserting title to it under such purchase. Harassed by vexatious litigation, and keenly alive to the dangers which on all sides were encompassing him, James Alexander Forbes determined to exceed his powers, and to outbid Mr. Shillaber for the Berreyesa land. Shillaber had offered them twenty-five thousand dollars; Forbes offered them thirty thousand. With Mr. Shillaber, in this proposed purchase, Mr. Walkinshaw had an interest. Indeed, it appears that Mr. Walkinshaw, angry, perhaps, at having been displaced by James A. Forbes, lent himself to all attacks on the Castillero title, in the hope, I presume, of acquiring a larger share of the mine under some other.

Nor in his precautionary measure did Mr. James A. Forbes confine himself to negotiations for the purchase of a part of the Berreyesa *Rancho*. In a letter written to Barron, Forbes & Co., on the twenty-eighth of October, 1849, pending Walkinahaw's possessory action against him, and Hawes' proceedings in denouncement, and Shillaber's negotiations for the purchase of the Berreysea land, we find the first authentic evidence of his revival of the suggestions and recommendations first made by him on the fifth of May, 1847, touching the fabrication of fraudulent title papers. As this letter gives a very full account of the state of affairs in October, 1849, I cite it in full:

(Private.) SAN FRANCISCO, October 28th, 1849.

WM. FORBES, ESQ.—My Dear Sir:—I have been detained here until the present moment, occupied in carrying out the arrangements explained to B., F. & Co. in my letters to them of yesterday's date, and to which I beg to refer you. My reason for purchasing the land of that part of the farm of the Berreyesas which I pointed out (to Mr. Alexander Forbes and yourself) on the map of the New Almaden, are, *first*—because I fear the destruction of some important papers of the original registry of the mine, and which I believe will be effected, or that on those very documents of registry a question

will arise as to the legality of the possession; *second*—because no posterior grant of the Government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated in the original *espediente* of registry; *third*—because I am convinced that Walkinshaw and his party have endeavored to make the purchase of the land, fearing that the denunciation will prove fruitless, in all of which cases they will come forward as the owners of the land comprising the mine and *hacienda*. Therefore it is a great risk for me to disregard the claims of the Berreyesas, and to set a dispute upon boundaries when I am uncertain as to the production of the documents held by Walkinshaw, and of the validity (in the accursed Courts of this country) of the original registry of the mine. In the present state of affairs you may rest assured that the most prudent and safest measure is that which I have adopted, and which I hope to carry out effectually.

I send herewith a copy of the fraudulent purchase negotiated by Games, the brother-in-law of Walkinshaw, in connection with Shillaber from the Sandwich Islands. This transaction was effected in the following manner. Walkinshaw and Games had been negotiating for some time previous with the widow Berreyesa and one of her sons, (to whom he, Walkinshaw, had loaned the thousand dollars in gold on the security of that son's share in the farm, of which you were informed by me in Tepic) for the purchase of the aforesaid part of the farm. During these negotiations the widow and her family became aware that something more important than the land and wood was contemplated in the purchase of that part of their farm, and consequently they advanced their demand of price.

In this state of affairs the denunciation of the mine by the attorney of Wilkinshaw is entered before the Alcalde, who was already prepared for the matter. The suit is commenced against me, and on Saturday the twentieth, the rascal of Games and Shillaber prevailed upon two of the Berreyesas to sign a contract to sell the aforesaid portion of the farm (as per copy herewith inclosed) under the condition that the rest of the heirs should be made aware of that contract, to obtain their consent and their signatures to the contract, and to give a formal deed of sale; but that before delivery of the deed the whole amount of purchase money should be paid. On the twenty-first I left the mine, and on my arrival in San José found that the widow Berreyesa had not signed any contract, nor had she given any person authority to sign for her; that Games had told the signing parties to sign for "*los interesados*" and for her. I then informed the widow that the whole transaction was a fraud, and that she would be thrown into a law-suit with me as agent of the owners of the mine; that in order to avoid this evil, she

should send her sons instantly to declare null and void the aforesaid contract, as it was entirely void.

This measure was carried out effectively, and that moment Shillaber offered twenty-five thousand dollars for the land, but no money was forthcoming. The parties refused any further overtures with Shillaber, and I immediately sent one of the heirs to Sonoma to obtain the signatures of three of the other heirs, and to-morrow I hope to conclude this purchase for the sum of thirty thousand dollars. I should have said that Walkinshaw, in his eagerness to obtain his object, delivered up to young Berreyesa the bond which he had received for the payment of twelve hundred dollars, and which bond Walkinshaw held as a lien upon the farm. The gold-dust had been tendered to Walkinshaw several times, but he had constantly refused, and on the morning of the twenty-first, Berreyesa paid the gold-dust and received the bond, which he destroyed.

I now desire to call your attention to the following important matter. In order to secure the possession of the land which was granted to Castillero and his associates, upon the mining possession of New Almaden, you must bear in mind that that document was not recorded in this country, but that it remains in the hands of Walkinshaw; that in all probability it will be destroyed, if it has not been destroyed already. That in view of these facts, and the deep plans laid by Walkinshaw, it behooves you to obtain from the Supreme Government of Mexico the full and positive grant of the two *sitios* of land upon the mine of New Almaden, under the date of the order to Castillero from Castillo Lanzas, bearing in mind that this grant must express the entire approbation of the Supreme Government of all the concessions made by the local authorities or Alcalde of the district of San José of the original grant or registration of the mine. That grant must be recorded under the date of its concession, and certified copies of the whole must be obtained and authenticated by the British Consul at Mexico, and at the earliest possible moment sent to me.

The boundaries must be expressed as joining on the north and north-west by lands of the *Ranchos de San Vicente* and *de los Capitancillos*, and on the east, south and west by *Serrania* or *terrenos valdios*.

The moments are pressing, and I write hurriedly. If possible, I shall advise you by this packet of the result of my operations.

I remain, my dear sir,

Yours most truly,

[*Trans.* 844.] JAS. ALEX. FORBES.

VII. It will be remembered, that when in May, 1847, James A. Forbes first became acquainted with the contents of the Castillo

Lanzas decree, a copy of which was appended to Castillero's ratification of the contract of *avio*, the feature in that instrument which made the strongest impression on his mind was the order on the Governor of California to put Castillero in possession of two square leagues. This was natural; for Mr. Forbes, who was a British subject by birth, and who had lived in California for many years as the agent of the Hudson's Bay Company, and as British Vice-Consul, had been but recently for the first time brought into contact with the authorities of our Government. Much of the influence and distinction enjoyed by him in the midst of a simple people, and under the Mexican rule, must have been lost when a patriarchal Government had been replaced by that of a stern conquerer, and grim General Mason had succeeded to the Alvarados, Micheltorenas and Pio Picos of the good old times. This new and arbitrary Governor of California, as James Alex. Forbes calls General Mason in his letter of the fifth of May, 1847, was the very last person in the country who would be likely to obey orders from the Mexican Government. On the contrary, it was his duty to see that no order of the Mexican Government should be obeyed by any person in California. It was therefore natural that James A. Forbes should have been most forcibly struck with that feature of the Castillo Lanzas decree which ordered the Governor of California to give possession of the land to Castillero, and should speak of it as an order which there was no one to obey, and which it would be dangerous even to mention. And nothing is more natural than that a man in his temper, and mood, and surroundings, ignorant of law, ignorant of our people and of their institutions, ignorant of the decisions of our Courts, and of the practices of our Government in regard to the protection of the private property of individuals in a conquered country, should have considered this decree of Castillo Lanzas worthless as a grant of land.

But more than two years had elapsed when he wrote his letter of the twenty-eighth of October, 1849. Meantime, the cession of California to the United States, which in May, 1847, he prayed God might forbid, had been made by treaty. He had learned much of our people, and had become a better lawyer. He no longer feared the arbitrary Governors of California. His distrust was transferred to "the accursed Courts of this country," as he calls them. Alcalde May,

at the instance of Walkinshaw, had issued *ex parte* orders against him, and had followed them up by forcible removal, and warrants of arrest. Walkinshaw, Hawes and Shillaber had combined to deprive him of the possession of the mine; to obtain judgment of forfeiture against his title, on the ground of abandonment; and to purchase the Berreyesa title, and claim the mine under it. The Alcalde at first seeming to side with his assailants, he was filled with apprehensions.

Let us note how, in the presence of these new shapes of danger, the old defective features of the Castillero title disappear, and new apparent defects spring into view. He says: "First, I fear the destruction of some important papers of the original registry of the mine, and which I believe will be effected; or that on those very documents of registry a question will arise as to the legality of the possession." This defect was suggested by Hawes' denouncement of the mine, and James A. Forbes proposes to remedy it by procuring from the Supreme Government a confirmation of the mining possession as it had been given by the *Alcalde*. He says, secondly, that he doubts the sufficiency of the two-league grant contained in the Castillo Lanzas decree, "because no posterior grant of the Government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated in the original *espediente* of registry." This difficulty derived its importance from the anticipated conflict with Walkinshaw and Shillaber, if they should succeed in their attempts to purchase a part of the Berreyesa *Rancho*. To understand its force, we must remember that by the Castillo Lanzas decree two square leagues of land were granted to Castillero on his mining possession, "which," says Forbes, "in the original *espediente* of registry is declared to be on the land of the Berreyesas." For the removal of this difficulty, he recommends, what he had not recommended before, that the title to be fabricated should specify boundaries, one of which should be the Berreyesa Rancho.

But throughout this whole letter, again and again he speaks of the original registry—of its *espediente*—he fears the destruction of some important papers relating to it—he refers to the Castillo Lanzas decree, as to a familiar document—and recommends that its date be adopted as that of the new grant whose fabrication he

suggests. Thus, by positive declarations first made in 1847, and repeated in October, 1849, he identifies the title papers of the claimant.

There is another circumstance which strongly corroborates their genuineness. In this letter of the twenty-eighth October, 1849, while James A. Forbes expresses the fear that Walkinshaw and his party will destroy the important papers of the registry of the mine, and the Castillo Lanzas grant, which he says has not been recorded, and is still in Walkinshaw's hands, and while he is endeavoring by every possible argument to induce his correspondents to procure the desired documents, he does not allude to any danger to be apprehended from Walkinshaw's knowledge of frauds which had been already perpetrated.

Now, if the *espediente* of registry and possession had been made in 1848, Walkinshaw must have known it. If Castillero's title papers from the Supreme Government had been made long after the American forces had taken possession of California, Walkinshaw must have known it. And yet, in 1849, when Walkinshaw was endeavoring to break down the Castillero title to the mine, and in that attempt, as Forbes believed, would go to the extreme length of destroying the Castillo Lanzas grant, which was in his possession, and while Forbes was enumerating all the dangers to be dreaded from Walkinshaw's measures, he expresses no apprehension of a disclosure by Walkinshaw of any fraud in the title papers. Mr. Forbes says Walkinshaw is doing all he can to defeat the Castillero title; says he has conspired with his attorney, Mr. Hawes, to obtain a judgment of forfeiture against it on the ground of abandonment; says he has combined with Mr. Shillaber to purchase the Berreyesa title, and claim the mine under it; says he will endeavor to destroy the papers of the original registry and possession; says he will destroy, if he has not already destroyed, the Castillo Lanzas grant in his possession, which has never been recorded. But Mr. Forbes does not say Walkinshaw knows that those title papers are antedated, and will attack our title on the ground of fraud. It is impossible to believe that James Alexander Forbes would have refrained from expressing such fears, if he had really felt them, and it is equally impossible to believe that he could have failed to see the imminent peril in which his fortunes stood from Walkinshaw's

knowledge of the fact that all the muniments of his title were the creatures of fraud and the handiwork of forgers. This is strengthened by the fact that in J. A. Forbes' first examination he constantly refers to Walkinshaw as the source of his information on all matters relating to the title of the mine.

When James Alexander Forbes wrote this letter of the twenty-eighth October, 1849, it had never entered into his mind to doubt the genuineness of the existing title papers on which he was commenting. No suspicion of their genuineness had ever reached his ear. He considered them to be defective, but he believed them to be genuine.

VIII. On the thirtieth October, 1849, James A. Forbes informed Alexander Forbes, that in the course of a few days he would be reinstated in the mine and *Hacienda;* and urges, notwithstanding his successful defense of Walkinshaw's possessory action, the necessity of purchasing a part of the Berreyesa *Rancho*. He says: "On the one hand I depend on the precarious and illegal possession of the mine, granted by the *Alcalde* of this district to Castillero, who was in reality the judge of the quantity of land given by the *Alcalde;* and on the other side I am attacked by the purchasers of the same land, declared by Castillero himself to comprise the mine;" evidently alluding to the *Alcalde's* grant of three thousand varas to all points around the mine, and to the statement in Castillero's representations, that the mine was situated on the lands of Berreyesa.—*Trans.* 393.

On the eighteenth November, 1849, James A. Forbes wrote to Barron, Forbes & Co. as follows: "I have to inform you that immediately after the judgment given by the Court of First Instance against the denunciation of the mine of New Almaden, I was cited to appear before that Court at the suit of Grove C. Cook, in which *he* laid claim to that property as being upon his land! This is the last effort of Mr. Walkinshaw, who I learn has offered to purchase a part of the land of Cook, and has thereby caused Cook to believe that the mine can be obtained in this suit! The ultimate object of Mr. Walkinshaw is to make it appear that the first possession of the mine is illegal, and very probably, by destroying the principal documents still in his possession, he expects to obtain his iniquitous

ends. Those documents are not recorded in California. I speak of the grant from the General Government, and the contract of *habilitacion*."—*Trans.* 952.

On the thirtieth November, 1849, Alexander Forbes, in a letter addressed to James Alexander, acknowledges the receipt of his letters by the two last steamers, with dates up to the thirteenth inst. These letters must have conveyed to Alexander Forbes the news of James Alexander's recovery of possession of the mine and *Hacienda*, and of the defeat of Hawes' attempt at denouncement; for it will be remembered that Hawes' protest against the *Alcalde's* refusal to receive evidence of the abandonment of the mine, and of the insufficiency of its original registry, was filed on the fifteenth November, 1849. In this letter, Mr. Alexander Forbes makes no allusion to any of James Alexander's fraudulent suggestions.—*Trans.* 395.

On the thirtieth November, 1849, Barron, Forbes & Co. also write to James Alexander Forbes, expressing the hope that he had received the Notarial copy of the grant of land by the Mexican Government to Castillero, which they had sent to him on the thirteenth inst.; and towards the close of their letter they say: "Castillero we expect will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted."—*Trans.* 394.

When this letter was written by his house in Tepic, Mr. Eustace Barron was in Europe. It was certainly very wrong for any person, no matter what his motive, were it even the humoring of an agent who had rendered great service in his energetic, legitimate defense of a valuable property, to acquiesce even apparently in James Alexander Forbes' criminal suggestions. But how much soever on the score of good morals we may feel constrained to reprobate such conduct, yet by an equal force—by the irresistible force of reason—are we drawn to the conclusion, from positive grounds of inference furnished by this very letter, that on the thirtieth November, 1849, nothing had been done to carry into execution James A. Forbes' suggestions.

"If anything can be done in Mexico," say they, "Castillero is the fittest to procure what may be wanted. But Castillero is not here—he is in Lower California—he will soon return to this place."

If this letter had made no allusion to James A. Forbes' suggestions for the procurement of fraudulent documents—if there were not a particle of evidence tending to prove that he had ever made the suggestions to them—such an utter absence of all proof would not, in the forum of reason, establish the fact that, on the thirtieth of November, 1849, no such documents had been procured, with half the certainty that that fact is established by the positive proof contained in this letter.

This proof consists not only in the statements respecting Castillero's absence in Lower California, and his being the proper person to procure what might be wanted from Mexico, if anything could be there procured, but also in the fact that it refers to the Notarial copy of the two-league grant which had been sent to James A. Forbes on the thirteenth of November, 1849. This Notarial copy must have been received in California before the end of that month. On the twentieth of December, 1849, James A. Forbes acknowledges the receipt of Barron, Forbes & Co's letter, "dated the thirteenth ultimo, inclosing a certified copy of the grant of the two *sitios* of land to Don Andres Castillero upon this mining possession."—*Trans.* 846.

The identical Notarial copy of the two-league grant referred to in these letters, and received by James A. Forbes in November, 1849, has been produced by the claimant and filed in this case. —[*Trans.* 545.] Its identity is proved by James A. Forbes in his examination on behalf of the Government.—*Trans.* 439, 462.

This document is an exact copy of the original Castillo Lanzas decree of the twenty-third of May, 1846, produced by the claimants as their grant of two square leagues in colonization. It is the second copy of that grant which James Alexander Forbes is proved to have seen before December, 1849: the first copy being that which was appended to the instrument in which Castillero, on the seventeenth of December, 1846, ratified the McNamara contract of *avio*, and which was shown to James Alexander Forbes by Robert Walkinshaw in April and May, 1847.

Discard the documentary evidence afforded by the five *espedientes* in the Ministries of the Mexican Government, consisting of many documents in many handwritings, signed by various high officers of the Republic, and relating to important business, both public and

private, which found its natural and necessary consummation in this Castillo Lanzas decree; discard the written record contained in a thousand ponderous volumes printed in 1847, and distributed among all the nations in Christendom; discard the parol testimony of the nine witnesses from Mexico, who prove the handwriting and signatures in these various documents, and almost all the facts therein recorded; discard the testimony of Mr. Castillo Lanzas, who declares that he signed this two-league grant on the day of its date, and that it is in all respects genuine; discard the testimony of Mr. Negrete, who declares that in 1846 he saw this grant, and caused it to be copied in Castillero's ratification of the contract of *avio*, and signed that instrument in which it was thus copied, and sent the original grant to Alexander Forbes, in December, 1846; discard the testimony afforded by James Alexander Forbes' letter of the fifth of May, 1847, in which he plainly identifies this two-league grant by his comments and criticisms, and by the faults he finds with it; discard the testimony of his several letters, written from time to time in the two succeeding years, in which he mentions this two-league grant, sometimes expressing a fear that Walkinshaw will destroy it; discard his ratification of the McNamara contract of *avio*, on the fourteenth of May, 1847, in which he copied *verbatim* the words of Castillero's ratification of the same contract; discard his parol testimony in which he declares that when, in May, 1847, he ratified the contract of *avio*, he had before him the instrument in which Castillero ratified it, and copied Castillero's language, and saw the appended copy of the two-league grant;—the legions of proof, assembling from many remote sources in great concourse around this grant, and sustaining it as only what is true can be sustained, you may scatter and annihilate, and there will remain in the grant itself such intrinsic evidence of genuineness, such palpable proof that it is not the offspring of fraud and conspiracy, as must command belief from all reasonable beings.

For, in the first place, this grant is in every respect what James A. Forbes advised that it should not be, and has not a single feature the insertion of which he recommended. It contains an order on the Governor of California to put Castillero in possession of the land. A most dangerous feature, says James Alexander, for there is no Governor who owes obedience to Mexican authority; in that

respect this Government is *acefalo* (headless); such an order is not only worthless, but absolutely dangerous, and should not be mentioned.

It is a grant of two square leagues on Castillero's mining possession; now, this possession, says James Alexander, the original registry declares to be on the *Rancho* of Berreyesas, whose land no posterior grant of the Government could authorize Castillero to occupy.

This grant, says James Alexander, "after making allusion to the proceedings of Castillero and the local authorities, without any explicit statement, goes on to state that the two *sitios* of land are conceded to him *como colono* upon his mining possession of the quicksilver mine he discovered in the *Mission of Santa Clara;* while the original documents of the mine and the contract of *habilitacion* declare that the mine is situated on the lands of José Reyes Berreyesa," five leagues distant from the Mission, as he says in another place. "Now it is evident that this oversight has been observed by Walkinshaw," he adds, "and hence his vociferations, and those of his attorney, demanding the production of the title to the *hacienda* and to the mine."—*Trans.* 847.

This grant sets forth, it is true, a copy of the decree which confirmed Castillero's mining possession; but the decree confirms that possession by reference to Castillero's proposed contract with the *Junta de Fomento*, which the Supreme Executive approved in all its parts. A person ignorant of the terms of this contract, which is merely referred to, not copied in the decree, could not know of what the Supreme Executive had approved. Such was the ignorance of James A. Forbes, as shown in his letter of the twentieth of December, 1849, where he says: "I know not what conditions Castillero may have proposed to the Supreme Government, but whatever they may have been, they of course cannot be fulfilled in California, by reason of the change of Government." The reference to Castillero's proposals was evidently prompted by a desire to convince his correspondents that the grant of two leagues, a Notarial copy of which had been sent him, the receipt of which he acknowledges in this letter, must be worthless by reason of the change of Government, whatever might have been the conditions proposed by Castillero, and approved by the Supreme Government.

The Castillo Lanzas grant, therefore, a copy of which James A. Forbes received in November, 1849, the identical copy being in evidence, contained all the provisions which for years past he had considered dangerous, repugnant, worthless. It is precisely such a grant as he advised should *not* be made. It is filled with all the faults which, in his opinion, would vitiate any document purporting to be a title. It does not possess a single feature which, in his opinion, would render it operative and efficient in law. It contains all that he advised should not be inserted, and omits every provision for the sake of which he urged the fabrication. It is therefore perfectly clear that its origin cannot be traced to his suggestions.

IX. Nor are the foregoing the only features in the grant which afford intrinsic evidence that it was not made in consequence of Forbes' counsel. It bears other marks of genuineness, which indicate, almost to the point of certainty, that it cannot be the result of any conspiracy, but is the necessary conclusion to which an important and notable piece of business, involving both public and private interests, and conducted in several Ministries of the Mexican Government, must have arrived, if any conclusion at all was reached.

To understand this argument, let us analyze the grant. It is a communication addressed to Castillo Lanzas, Minister of Relations of the Mexican Government, to the Governor of California, on the twenty-third of May, 1846; and contains:

First. A copy of an official communication from Becerra, Minister of Justice, to Vicente Segura, President of the *Junta de Fomento*, dated the twentieth of May, 1846; and

Second. A copy of an official communication from the same Minister of Justice to the Minister of Relations, dated also twentieth of May, 1846.

From these two official communications we learn the following facts:

First. That on or before the fourteenth of May, 1846, Castillero had made a certain petition to the *Junta de Fomento*, asking aid from the Government in opening and developing a quicksilver mine which he had discovered in *Alta* California.

Second. That this petition contained at least eight propositions, and that the eighth related to a grant of lands in California.

Third. That on the fourteenth of May, 1846, the *Junta de Fomento* had transmitted Castillero's said proposals to the Minister of Justice, and in an official communication of that date, addressed to said Minister, had recommended their adoption by the President; thereby manifesting, so far as their powers extended, their assent to Castillero's proposed contract.

Fourth. That the President *ad interim* of the Republic, regarding the contract thus proposed by Castillero, and recommended by the *Junta de Fomento*, as having received the assent of that body, spoke of it as a contract already made, and approved it in all its parts on the twentieth of May, 1846.

Fifth. That in consequence of such approval, and to carry out the only undertaking on the part of the Government which required the intervention of another Ministry, the President directed that the appropriate communication should be sent to the Minister of Relations, so that the proper orders might be issued concerning what was contained in Castillero's eighth proposition relative to a grant of lands in California.

Sixth. That accordingly, on the twentieth of May, 1846, the Minister of Justice, in an official communication of that date, addressed to the Minister of Relations, informed him that the President had acceded to Castillero's petition for a grant of two square leagues on the land of his Mining possession, and requested the Minister of Relations to issue the corresponding orders. All these facts we learn from the Castillo Lanzas decree of the twenty-third of May, 1846; a Notarial copy of which James A. Forbes received in November, 1849.

Now, if such a piece of business as these facts indicate was really entered upon between Castillero and the Mexican Government, this Castillo Lanzas decree would be its natural conclusion, and therefore such a decree would be a probable and expected thing—an event, not whose occurrence, but whose failure to occur, would cause disappointment and surprise.

If, on the other hand, none of these proceedings took place, and the whole business is a fiction and its record a forgery, as the United States contend, it is surely the most extraordinary, the most complicated, the most easily detected, the most useless fiction and

forgery which was ever devised and executed. It calls into its perpetration the three members of the *Junta de Fomento*, Segura, Bassoco, Flores, and the Secretary of the *Junta*, Ysidro R. Gondra; it implicates equally Paredes, President of the Republic; Becerra, Minister of Justice, and Castillo Lanzas, Minister of Relations; it involves the existence of various official communications, copies of two of which it purports to give; and devises a piece of public and private business in which there must have been numerous actors and witnesses, and the various stages of whose progress must have been noted in many records and minutes. In fine, it recites many facts, pregnant with many other facts, each one of which points to the proof of its own falsity—seeking detection from which escape is impossible.

If the Castillo Lanzas decree is a forgery, then the documents it refers to must be forgeries, as the United States contend. Take for instance one of them—the letter of the fourteenth of May, 1846, from the *Junta de Fomento* to the Minister of Justice. This letter refers to one of the fifth instant, numbered 573, written by the *Junta* to the said Minister. We go to the last named letter, and find in it the following statements, to wit: That Professor Don Tomas Ramon del Moral had presented to the *Junta* certain specimens of cinnabar, sent to him by Don Andres Castillero, with the object of inciting the Supreme Government to aid his enterprise; that the specimens were immediately sent by the *Junta* to the Director of the College of Mining for assay; that the Director, in an official communication, dated the twenty-first of April, 1846, referred the matter to the *Junta Facultativa* of the College; that the President of said *Junta Facultativa*, on the twenty-fourth of April, 1846, addressed a letter to the Director, giving him the result of the assay made by Don Manuel Herrera, Professor of Chemistry, and stating to him that the specimens not assayed were deposited in the Cabinet of Minerals, and that Castillero's discovery was a most important one, and entitled him to the protection and aid of the Government; that the Director of the College, in an official communication, dated the twenty-ninth of April, 1846, but not received by the *Junta de Fomento* until the fourth of the following month, informed the *Junta* of the result of the assay, by inserting in his letter a copy of that which he had received from the

Junta Facultativa of the twenty-fourth of April, 1846; and finally, that the *Junta de Fomento* had already asked Señor Castillero what kind of aid or protection he required for the encouragement of his brilliant enterprise, congratulating the Supreme Government on so happy a discovery.

The foregoing are some of the facts with which the letter of the fourteenth of May, 1846, from the *Junta de Fomento* to the Minister of Justice, is pregnant. I give them as an instance and illustration. Here are new complications introducing new documents and new actors. General Tornel, the Director of the College, and ex-President Herrera become parties; the four members of the *Junta Facultativa* of the College, to wit, Moral, Balcarcel, Navarro and Castillo, are lugged in; the Professor of Chemistry is seen in his laboratory, assaying the specimens; and even the Cabinet of Minerals is drawn into the vortex. The Director of the College is made to write a letter; the *Junta Facultativa* to hold a session; to pass a resolution; to record its proceedings, and communicate that resolution to the Director, in a letter dated the twenty-fourth of April, 1846, of which a copy is furnished.

Take the foregoing as a specimen, and let us ask ourselves the questions: Do men, who are prompted by a greedy desire for wealth to enter into a conspiracy requiring wariness, circumspection, caution and ingenuity for its successful consummation, thus wanton in useless fictions, and revel in unnecessary forgeries? Do they thus enlist against themselves an army of living witnesses, and furnish their adversary with the roll-call? Do they thus court failure and disgrace, by exposing their crime to easy and inevitable detection? Do they thus scatter broadcast around the principal act the damning proofs of their villainy; and awakening justice with all the clamorous tongues of rumor, demand that she shall snatch from their hands the golden fruits of crime, and leave them only its shame and infamy? Do conspirators proclaim beforehand the object of their plot, and the means they have devised to attain it? Do they publish its progress to the world, day by day, as it advances? Do they confess their crime as soon as they have committed it, and surrender themselves to the law which they have violated?

All these things were done in Mexico, in the year 1849, if in

that year the Castillo Lanzas decree was fabricated. How shall I demonstrate what is axiomatic? What more can I say to prove the absurdity of the hypothesis that this grant is a forgery, and to expose the exorbitant and insane demands upon human credulity which he makes who asks this Court to believe that it is so?

The value of the intrinsic evidence afforded by the features of the grants to which I have referred is enhanced by two considerations: the first is, that none of the important provisions are inserted, which are declared by the chief counselor and adviser to be essential elements of title—while we find present in it all the particulars which he had repeatedly asserted to be positively hurtful and legally insufficient. The second is, that the letter of Barron, Forbes & Co., of the thirtieth of November, 1849, written seventeen days after they had sent the Notarial copy, speaks of James A. Forbes' advice in regard to the procurement of fraudulent title papers in these terms; "Castillero we expect will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted."—*Trans.* 394.

Without attempting to justify this partial entertainment of Forbes' criminal propositions, from whatever motive it may have proceeded, we cannot by any argument avoid the inference from this letter, that on the thirtieth of November, 1849, nothing had been done in carrying those propositions into effect.

X. The intrinsic evidence of the genuineness of the Castillo Lanzas decree, which is so abundantly afforded by the importance and publicity of the business which found in it its natural conclusion; and by the various written documents to which it refers; and by the numerous actors and witnesses whom it introduces; and by the incidental facts and circumstances connected with it—all of which do but multiply the proofs and fraud, if fraudulent it be, and render its exposure the simplest task in the world, I cannot dismiss, without bringing it into its proper relation with the conduct of the Government.

Not in the spirit of a greedy litigant, whose standard of honor and morals is fixed by the criminal code, and who, acknowledging no obligations, and practicing no restraints—save such rude and imperfect ones as are imposed by the law—clutches at everything

that lies outside the domain of crime; but as an honest party to a plain contract, conscientiously seeking the path of his duty—as one of two nations who, invoking "the name and the protection of Almighty God, the author of peace, arranged, agreed upon and signed" a solemn treaty—as a powerful Government, upon whom the right of a helpless individual imposed a correlative obligation—the United States ought to have consulted all these sources of information, from which it was so certain that the very truth might be ascertained.

This they did not. But contravening the usage of all civilized nations—trampling under foot the great fundamental principle which underlies free government—violating their pledged word—at the sacrifice of justice, and freedom, and truth, and honor—here, in this Court, before you, sirs, the Judges of their appointment, the United States have called up for judgment the rights of this claimant; having denied him, through all the long and tedious years of this trial, and in spite of his entreaties and demands, that which the practice of the States of Christendom accords to all suitors in their Courts, and which their common sense perceives to be indispensable to justice—I mean the opportunity, by legal process, of placing upon the record the evidence of the facts by which the judgment of the Court must be determined, and his rights decided.

PART SIXTH.

FROM DECEMBER, 1849, TO THE TENTH JANUARY, 1851, THE DATE OF THE LAST LETTER IN THE CORRESPONDENCE.

It being thus established by the testimony of the Government's witness, corroborated by documents offered by the Government, that in November, 1849, James Alexander Forbes received a Notarial copy of the Castillo Lanzas decree, which is our two-league grant, it is clearly a work of supererogation to attempt to show that there is nothing in the correspondence subsequent to that period, tending to prove that the title offered by us was made after November, 1849; yet I shall briefly allude to that correspondence as containing proof positive that nothing was done by any party in Mexico towards procuring fraudulent documents.

On the twentieth December, 1849, James A. Forbes writes to Barron, Forbes & Co., acknowledging the receipt of their letter of the thirteenth of the preceding month, "enclosing," as he says "a certified copy of a grant of the two sitios of land to Don Andres Castillero upon his mining possession." In this letter, with this copy of the grant before him, he reiterates nearly the same objections to its legal efficiency which from May, 1847, he had from time to time set forth—and continues to urge on his correspondent the necessity of procuring new documents of title with different provisions. It seems to me to be impossible, that any man can read the Castillo Lanzas decree with reference to Mr. Forbes' comments, and criticisms, and descriptions of the two-league grant to Castillero, contained in his numerous letters from the fifth

May, 1847, to the early part of the year 1850, and not recognize it at once as the document of title commented upon, criticized, and described in that correspondence. Comment, criticism, and description could not more closely identify any document. Nothing could, except perhaps a copy. And even that complete identification we have in two instances; the first, in his letter of the fifth May, 1847, where he refers to the copy of the Castillo Lanzas decree appended to Castillero's ratification of the McNamara contract; the second, in his letter of the twentieth December, 1849, where he refers to the Notarial copy enclosed in Barron, Forbes & Co's letter of the thirteenth November, 1849, and received by him. Both of these copies of one and the same document, thus referred to by him, are in evidence. Both are proved by such testimony as must establish their existence in December, 1846, in May, 1847, and in November, 1849, respectively, if it is possible for documentary and parol evidence to establish any fact. On these points there is no conflict of testimony. The direct evidence bearing upon them is perfect. The collateral circumstances all harmonize with them.

On receiving the Notarial copy of the grant which we have produced, James A. Forbes was of course no better satisfied with the original than he had been since April, 1847, when he first saw the copy of the same grant appended to Castillero's ratification of the McNamara contract. Accordingly, on the twentieth December, 1849, in a letter addressed to Barron, Forbes & Co., he renews his old objections, and urges the fabrication of new title papers. It is in this letter he says that he knows not what conditions Castillero may have proposed to the Supreme Government, but whatever they may have been, they could not be fulfilled in California by reason of the change of Government.—*Trans.* 846–7–8.

On the seventh January, 1850, Alexander Forbes writes to James Alexander, that "Castillero is still somewhere in Lower California; we have not heard from him, but he must be somewhere about La Paz."—*Trans.* 397–8–9.

From the letter of Alex. Forbes of the third February, 1850, to James Alexander, we hear for the first time of Castillero's being in Tepic. He had then just returned from Lower California. Of course, he was asked all about the title, and what he replied is shown in the following extract from the above mentioned letter:

"We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas, given by the Alcalde on giving possession of the mine. As a doubt may be started as to whether the Alcalde, acting as the 'JUEZ DE MINERIA,' had the right to make this grant, yet, if approved by the Government of Mexico before the possession of the country by the Americans, there could be no doubt upon the subject. This takes in our *Hacienda*, and unless opposed by the Berreyesas, would, I think, settle the question. Castillero says such approval was given, and that on his arrival in Mexico he will procure a juridical copy of it; this is the plan we shall adopt if we hear nothing from you to alter this resolution." [*Trans.* 402.] And that Castillero told the truth is perfectly proven by the Castillo Lanzas despatch, with whose contents James A. Forbes had been familiar since April, 1847—only he did not know what were the proposals of Castillero mentioned therein, of which the Supreme Government had approved.

This letter also notes Mr. Eustace Barron's return to Tepic. He had been absent many months in Europe.

On the sixth February, 1850, Messrs. Barron, Forbes & Co. reply to James Alexander Forbes' letter of the twentieth January, as follows:

DEAR SIR:—In reply to your private letter of the twentieth December, respecting the two sitios of land, we have to say that we had hoped the document lately sent for this grant to Mr. Castillero would have been sufficient; but as you seem to be doubtful on this point, we have spoken to him, he being now here, and his opinion is, that if this grant is not tenable it will be better to go upon the three thousand varas of the Alcalde, granted at the time of giving possession of the mine, and approved of by the Mexican Government, which approval will be taken from the Mexican archives and sent on to you. Although by the Ordenanzas of Mineria, the Alcalde or Judge may not have had strictly a right to grant these three thousand varas, yet being approved by the Mexican Government, would make this valid as a *grant*. We hope, however, you will find the Berreyesas' lands not to include the *Hacienda*, and consequently either the grant of the two sitios or the three thousand varas would be a sufficient title. Mr. Alexander Forbes will, however, write you more particularly on this subject."—*Trans.* 543.

Vexed and disappointed by the unheeding coldness with which his advice was treated in the two foregoing letters, James A. Forbes, on the twenty-sixth February, 1850, addressed the following letter to Mr. Alexander Forbes:

ALEXANDER FORBES, Esq.

My Dear Sir:—Your favor of the third instant came duly to and, and in answer to that part of it relating to the documents sent up to me in November, serving as titles to his property, I will again address you POR SEPARADO.

I really did have more faith in the tact and ability of Castillero to perceive the important objects set forth in my memorandum of what was to be done nine months ago in Mexico by that eccentric individual, and that with the powerful influence that he was to have exercised by the efficient aid that was to be lent to him, he would meet with no obstacle to the attainment of the important documents explained in this memorandum. But Castillero has deceived himself, for he thought that boundaries were not necessary, as I shall presently show you.

He succeeded in obtaining the grant of two sitios to himself on the mining possession in SANTA CLARA, while that very act of possession declares that the mine is situated on the lands of José R. Berreyesa, five leagues distant from Santa Clara, and you will at once perceive that such a discrepancy would not fail to attract the attention of the United States Land Commissioners, and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

Without troubling you with what I have so many times written and explained to you verbally, on the importance of the acquisition of the *document*, I will only say what it *must* be, and it is this:

First. A full and complete ratification of all the acts of the Alcalde of this jurisdiction in the possession of the mine.

Second. A full and unconditional grant to Castillero of two sitios of land covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you in Tepic. Both of these documents to be of the proper date, and placed in the proper governmental custody in Mexico: and,

Third. The necessary certified copies of them duly authenticated by the American Minister in that capital, taken and sent to me at the earliest moment.

You will receive my advice on the nineteenth inst., regarding my views of not supplying W. with any quicksilver.

Yours, sincerely,

[*Trans.* 403.] JAS. ALEX. FORBES.

When, in 1847, James A. Forbes for the first time saw a copy of our two league grant, he wrote his letter of the fifth of May, of that year, pointing out its manifold imperfections, as he thought, and urging the fabrication of other title papers.

When in December, 1849, he received another copy of the same grant, he wrote his letter of the twentieth of that month, pointing out the same imperfections in the original, and making the same suggestions as to the fabrication of new papers.

When his correspondents, on the third and sixth of February, 1850, decline to adopt his suggestions, or follow his advice, saying that in their opinion and Castillero's the genuine title is good enough, and that they will rely on it, and send him the contract referred to in it, proving the confirmation of the mining title; full of contempt for their judgment, and disappointed that his plans have not been adopted by them, he takes no pains in his reply to conceal his sentiments, and still pertinaciously insists that his advice shall be followed. Such was his letter of the twenty-sixth of February, 1850.

There are truths which reasoning obscures, because they live nearer to the innate light of mind than arguments can ever approach. If in the course of the foregoing remarks I have attempted arguments to prove axioms, this betrayal into error has been caused by a desire on my part to check the fermentation of spirit which the investigation of the facts of this case has excited, even to the obscuration of axiomatic truths.

In support, then, of the genuineness of the Castillo Lanzas grant, we have—

First. The important public and private business transaction between Castillero and the Mexican Government—conducted on behalf of the latter by its Junta de Fomento de Mineria, by its National College of Mining, by its Ministry of Justice, by its Ministry of Relations and Government, and by its Governor of the Department of California, whose natural termination in Mexico was this grant.

Second. The affair thus conducted was deemed so important to the great mining interest of Mexico, which had languished for many years in want of an abundant and cheap supply of quicksilver, that

the Prime Minister of the Republic in December, 1846, reported the matter to the General Congress, narrating fully what had been done, and earnestly recommending it to their favor and assistance. This report was printed in 1847, and distributed among all civilized nations.

Third. The testimony of Mr. Castillo y Lanzas, that he signed the grant on the day of its date, and that it is in all respects true and genuine.

Fourth. The testimony of Mr. Velasco, that he wrote the grant, and that in all respects it is true and genuine.

Fifth. The testimony of Mr. Negrete, that he saw it in Mexico in December, 1846; that Castillero then handed it to him, and he to his lawyer, Mr. Romero, to aid in the draft of the public act of ratification of *avio;* that it was referred to in said instrument, and copied at the end of it; that he then sent it to Mr. Alexander Forbes, of Tepic; that the document in the archives of the Land Commission is the one he saw in 1846.

Sixth. We have the protocols of the Notary Fuentes, containing the said acts of Castillero's ratifying the McNamara contract, dated December 17th, 1846, where this grant is copied verbatim.

Seventh. We have the *testimonio* of that instrument made out two days after its execution, signed by Nazario Fuentes, the Notary Public, whose signature and *signum* are attested by three Notaries Public, by certificate under seal of the National College of Notaries of Mexico, dated December 19th, 1846. In said *testimonio* this grant is copied.

Eighth. We have a certified copy of the same instrument of ratification issued from the office of the Notary Fuentes, under his hand and seal, on the sixth of February, 1847, with a certificate by three Notaries Public, dated on that day, and attested by the seal of the National College of Notaries, like the *testimonio.* In this certified copy our grant again appears.

Ninth. We have the testimony of Mr. Villalon, whose name and *signum* appear on each of the foregoing certificates, declaring that he signed them on their respective dates, and that they are in all respects genuine, and proving the signatures and *signa* of the other Notaries who signed them, and also the seal of the National College of Notaries affixed to them.

Tenth. It is proven that Mr. Walkinshaw, as the agent of Alex. Forbes, came from Tepic to California to take possession of the mine, by virtue of the McNamara lease, confirmed as it had been by Castillero, and that he brought with him a copy of Castillero's ratification, and that he took charge of the mine in April, 1847.

Eleventh. We have the testimony of James Alex. Forbes, proving that before the fifth of May, 1847, he had seen a copy of Castillero's said public act of ratification, containing a copy of our two-league grant, and that in his own act of ratification he copied the words used in Castillero's.

Twelfth. We have his letter of the fifth of May, 1847, describing this two-league grant, a copy of which he had first seen in the document exhibited to him by Mr. Walkinshaw, and identifying it by his comments and criticisms with absolute certainty.

Thirteenth. Between the fifth of May, 1847, and the twentieth of December, 1849, James A. Forbes in his letters frequently refers to this two-league grant.

Fourteenth. On the twentieth of December, 1849, he acknowledges the receipt of a Notarial copy of the same grant; and we have the identical copy which he received in evidence, proved by himself to have been received in November, 1849.

By such "a long-leveled rule of streaming light," we follow this grant through the record; to the first day of its existence, the twenty-third of May, 1846; to its author, the President of Mexico, who signed it with the hand of Castillo y Lanzas, his Minister of Relations, Government and Police.

PART SEVENTH.

FROM FEBRUARY 26TH, 1850, TO DECEMBER 14TH, 1857, WHEN JAMES ALEXANDER FORBES IS FIRST EXAMINED IN THIS CASE ON BEHALF OF THE UNITED STATES.

This period embraces—

First. The arrival of Don Isidoro de la Torré in California, about April, 1850.

Second. The appointment of Capt. H. W. Halleck, as Director of the Mine, in April, 1850.—*Trans.* 228.

Third. The sale by James A. Forbes to John Parrott, of one of his two *barras* in the mine for $24,000, on the ninth August, 1850. —*Trans.* 179.

Fourth. The proceedings in the suit of M. Z. Berreyesa and others *vs.* James A. Forbes and Robert Walkinshaw. Complaint filed August 26th, 1850.—*Trans.* 220.

Fifth. The transfer from the Mayor's office at San José of the original record of registry and possession, in January, 1851.—*Trans.* 331–2.

Sixth. The presentation and conduct of the present claim before the Board of Land Commissioners, September 30th, 1852.—*Trans.* 5 to 129.

Seventh. The sale by James A. Forbes to Wm. E. Barron, of his remaining *barra* in the mine, for the sum of $30,000.—*Transcript*, 190.

Eighth. The bankruptcy of James A. Forbes, and his conspiracy with Laurencel to levy black-mail on the New Almaden Company, by frightening them into a compromise.—*Trans.* 376.

I. The arrival of Don Isidoro de la Torré, as the general agent of the company, in April, 1850.

It appears from the correspondence between Barron, Forbes & Co., Alex. Forbes, and James Alex. Forbes, that Mr. de la Torré must have arrived in California about the eleventh of April, 1850, to take entire charge of the mine, and organize its operations.

We have a letter from James A. Forbes to Mr. de la Torré, dated June 18th, 1850, inclosing certain papers belonging to the company, some of which are thus specified:

"One sheet of Mexican stamped paper, of the fifth seal, containing a certified copy of the communication from the Minister of Foreign Relations, relative to the two square leagues of land on New Almaden."

"Six sheets of common paper, containing certified copies of the contract of *avio* of the mine of New Almaden, including a copy of the document to which the above mentioned sheet refers certified by the British Consulate at Tepic."

"Seven sheets; seven sheets of Mexican stamped paper of the fourth seal, with certified copies of the original contract of partnership in the mine of New Almaden, dated November 2d, 1845; of the power of attorney from Don José Castro to McNamara, to make the contract of *avio;* the ratification of the same by D. Andres Castillero, and concession of the two square leagues; Castro's ratification, etc., certified by the American Consulate at Tepic."

The papers just enumerated contain three copies of the Castillero Lanzas two-league grant.

II. Captain Halleck's appointment as Director General of the mine is stated by himself to have been made in March or April, 1850. See his deposition.—*Trans.* 328.

III. Sale of one barra to John Parrott for $24,000, found in *Transcript*, 179.

IV. The proceedings in the suit of M. Z. Berreyesa *et al. vs.* J. A. Forbes and Robert Walkinshaw.—*Trans.* 219.

This was an action of trespass, seeking $20,000 damages for wood, timber, limestone, etc., taken by defendants from plaintiffs' land, and not the recovery of possession. The record of this suit derives its only interest from an affidavit made by Capt. Halleck, in answer to a demand of the plaintiffs for a copy and inspection of such documents as the defense intended to rely on. The demand and order of the Court will be found in Transcript, 265. The order was made under the Practice Act of 1850, sec. 294, Statutes 1850, 455. It required the production of such papers as the defendants had in their custody or under their control, not of a public record.

What papers could the defendants have had in their possession?

The answer is found in the provisions of the Ordinances, according to which the owner of a mine would have in his possession—first, the original written statement in registry; and second, the certified copy of the record of the act of possession. Tit. 6, art. 4, Hal. 224.

Whether or not Captain Halleck consulted the Ordenanzes de Mineria when he made that affidavit, I know not. I presume he did, for he was at that time familiar with the Spanish language.

It is certain, however, that he correctly described the papers, which according to the strict terms of the ordinance should be in possession of a mine-owner. The certified copy of the record of the act of possession is made by law the corresponding title of the party.

And moreover, it is the *original*, in the sense in which that word is used in the Spanish law. It is the evidence of title delivered to the mine-owner, and bears the same relation to the record preserved in the Alcalde's office, that the first copy of an instrument taken from the protocols of a Notary and delivered to a party, does to the protocol itself. As there is some confusion of ideas on this subject, I hope to be excused for the following explanation: Escriche says, public instruments are of three kinds—first, the protocol or register; second, the original; third, the *traslado*, or the copy taken from the original.

"The protocol is the *matrix* writing, signed by the parties and the Notary, and extended in the form and with the circumstances

we have described." * * "This writing is called the *protocolo*, because it is the first or principal; the *register*, because it remains in the office of the Notary, in order that with it, in case of doubt, the copies may be compared, and the *matrix*, because it is the fountain and original, whence are taken the copies, *traslados* and *testimonios* which the parties interested ask for."

"The *first copy* which is accurately and faithfully made from the *matrix* writing, or protocol or register, by the same Notary before whom the act passed, is called the *original* or *primordial*. * * The *traslado*, *trasunto* or *ejemplar*, which is commonly called *testimonio por concuerda*, is the copy which is made on the exhibition—not of the *matrix* writing, but of the original, or of that which supplies the place of such, although it be not the 'first copy.'"

The Supreme Court, in Percheman's case, 7 Pet. 83, understanding very well these distinctions of the Spanish law, says that a certified copy of a petition and decree issued to a party from the Secretary's office is, in contemplation of law, an original.

It cannot be questioned, therefore, that the *copia autorizada* of the proceedings in registry and possession, which the ordinances direct to be delivered to the mine-owner as his corresponding title, as an original, was by Captain Halleck, in his affidavit, properly so called.

Moreover, even if we had been aware of the existence of Castillero's original representations in registry, and of the original record of the act of possession in the Mayor's office at San José, and if we had been willing to supply with them the place of the documents which the law expects to find in the custody of the party as his corresponding title, we would not have been prepared to go to trial without other evidences of trial, so authenticated as to be competent testimony in the case. We did not choose to rely on a part of our strength. We chose to make the best defense the facts of the case admitted of.

For that reason, doubtless, it was not until about three weeks after the affidavit was made that Captain Halleck first searched in the Mayor's office at San José, for such documents relating to the Almaden mine as had been transferred thither from the old Alcalde's office.

Since I last argued this point, on the motion to dissolve the injunction, there has come to light this certified copy of the record of

the act of possession—this *corresponding title*, which the ordinances direct to be delivered to the party—this *original* which Capt. Halleck declared he believed to be in the possession of parties in Mexico.

These were the papers the order of the Court of the thirteenth of September, 1850, called for. They were at that time in the hands of Mr. Robert Walkinshaw, and part of the papers, doubtless, whose destruction by him J. A. Forbes, as we have seen, so much feared. Even in 1850 Mr. Walkinshaw was on bad terms with the New Almaden Company. The old quarrel was not forgotten, nor the adverse interests reconciled. Mr. Walkinshaw claimed one *barra* in the mine under Padre Real's conveyance of the ninth of August, 1849, his title to which the company refused to acknowledge. After many threats to sue, he finally brought an action against Messrs. Bolton, Barron & Co., on the second of February, 1853, to recover the dividend due to that *barra*. Messrs. McAllister, Edwards and Rose were his attorneys. In December, 1852, or the month following, he put those gentlemen in possession of such papers as he thought had a bearing on the questions involved in the controversy, and among others handed to them the expediente of the registry and possession, containing the *copia autorizada*, or original of the act of possession. In this suit Mr. Walkinshaw failed. It was dismissed on the twenty-sixth of June, 1854. But the papers remained in the hands of his attorneys until the fifteenth of May, 1858, when they were returned to him a few days before he left California for Europe in almost a dying condition. They were then put in a paper envelope, labeled "Papers relating to the disputed *barra* between R. Walkinshaw, etc.," and taken charge of by Mr. John Young. About the first of July in this year, the counsel for the New Almaden Company, having occasion to examine all the conveyances of Padre's Real's *barras*, caused an examination to be made among Mr. Walkinshaw's papers for such as might relate to that matter. This search led to the discovery of the papers under consideration.—Exhibit Young, No. 1; Trans. 2688 is a copy of them. See Young's deposition, Trans. 2684; Bell's, 2696; McAllister's, 2698; Reese's, 2712; Suñol's, 2718; Pico's, 2731; Noriega's, 2803; Chavoya's, 2806; Sainsevain's, 2809—where the history of these papers is satisfactorily related and their execution proved.

V. A few weeks after the filing of Captain Halleck's affidavit, he found in the Mayor's office the original papers of the registry and possession of the mine. See his deposition, Trans. 331. A copy of them will be found in Trans. 257.

The originals were filed in the County Recorder's office of Santa Clara county, on the eighteenth of January, 1851, at three o'clock, P. M., as appears by the indorsement of J. T. Richardson, Recorder.

And here I may properly notice some circumstances which have doubtless obscured the existence of these papers in the records. Long before the Americans endeavored to wrest this mine from its true owners, it had changed its name. The superscription on the espediente is in these words:—*Año de* 1845. *Posesion de la Mina de Santa Clara.* As far back as October, 1846, we have seen that it was called Almaden de Santa Clara; in a short time the distinctive words *of Santa Clara* were dropped, and it came to be known as New Almaden.

Neither in the year 1849 did the mine, in common report, retain its connection with the name of its discoveror, Castillero. Since April, 1847, Walkinshaw had been in the management and possession of it. From April, 1848, he and James A. Forbes were the only resident owners in California. In 1849 it was known as Forbes' mine, or Walkinshaw's mine.

The prominence of the mine of New Almaden in 1849 and '50 would doubtless have arrested the attention of any person looking over the archives of the Mayor's office, who might see an espediente with a superscription containing the name of *New Almaden;* but such a person would not have been attracted by a paper relating to the *mine of Santa Clara*, especially as there were many espedientes in that office relating to mines; as for instance, those of Guadalupe and San Antonio.

It must be remembered, also, that the old population had been in those days shoved aside by the new race of settlers, who took all the offices, and were the custodians of the archives, not one paper of which, in many cases, could they read.

In a subsequent part of my argument, I shall show that the positive evidence, proving the existence of this espediente in the archives at San José, from December, 1845, is conclusive.

But Mr. Hawes, who was the counsel of Mr. Walkinshaw in 1849, and a very excellent Spanish scholar, knew the original name of the mine, and the names of its discoverer, and his partners, and their assigns, and declared that he stood ready in Court with records to prove that the original registry was *insufficient*, and therefore void.

VI. In support of his claim, Castillero filed a copy of the following paper:

On the day on which the record of the act of possession was written out, a copy of it was given to Castillero, signed by the Alcalde Pico, and by Suñol and Noriega, the assisting witnesses to the act of possession—the same parties who signed the record deposited in the Alcalde's office. Castillero also took from Pico a receipt for his fees, amounting to twenty-five dollars.

On the thirteenth of January, 1846, Castillero obtained certified copies of his two written statements in registry, signed by Pedro Chavoya, Alcalde, who came into office in that month, and by José Suñol and Pedro Sainsevain, assisting witnesses. These documents, together with a copy of the articles of partnership, he put together, and they constituted his expediente of title. They were, at that time, all the title papers relating to the mine in the possession of parties; the two written statements in registry remaining in the office of the Alcalde with the record of possession.

This expediente James A. Forbes made a copy of, and in January, 1848, took his copy to Weekes, Alcalde, to certify as copies of originals in his office, which Weekes did.

The copy thus made by Forbes, and certified by Weekes, was copied in our office, marked "A," and with a translation of it, marked "B," was filed before the Board of Land Commissioners with the claimant's petition. This is the celebrated Weekes copy, of which the Court has heard so much. It is a copy of the papers relating to the title of the mine, put together, as I have shown, by Castillero, and which were recently found among Walkinshaw's papers. Thus is the Weekes copy satisfactorily explained to any reasonable mind.

The claimant also filed with his petition an office copy of the Castillo Lanzas two-league grant, to which was appended a certificate of Jesus Vejar, Notary Public in Tepic. This certificate

having been the subject of much comment and animadversion, we will give a translation of it in full:

I certify that the present authentic instrument signed by the excellent Señor Minister of Foreign Relations, Government and Police, Castillo Lanzas, has been respected and obeyed (*obsequiado*) under that signature by the Mexican authorities which were governing in Upper California in the year 1846, according to insertions which the same authorities made of that instrument in acts (*actos*) which they authenticated (*autorizaron*) relating to the business of which said acts treat, and which I certify that I have seen; and for this reason, that signature in the said instrument ought to be considered as of the hand and writing of the Excellent Señor Minister, and also because Señor Don Andres Castillero has acknowledged it in acts which have passed before me.

And at the request of Messrs. Barron, Forbes & Co., I sign and seal (*firmo y signo*) this present, in Tepic, on the fifteenth March, 1850. [Signed] Jesus Vejar.

To this is attached a certificate by two Notaries Public, attesting the signature and seal (*signo*) of Jesus Vejar.

The object of the foregoing certificate is simply to prove the genuineness of Castillo Lanzas' signature to the document to which the certificate is appended. The Notary certifies that he believes said signature to be genuine, and gives his reasons for that belief. They are two: first—because the instrument which bears the signature has been respected and obeyed (*obsequiado*) under that signature by the Mexican authorities which were governing in Upper California in the year 1846. But in what manner was it respected and obeyed? His certificate answers that question thus: by their inserting, copying it into written instruments (*actos*) relating to business affairs which passed before them, or which they authenticated (*autorizaron*). By what Mexican authorities was it thus respected and obeyed? The certificate answers that question also: by the officers who inserted or copied it in the written instruments (*actos*) which they passed or authenticated (*autorizaron*). These officers could be none other than Notaries Public.

The written instrument (*actos*) in which the document signed by Castillo Lanzas was inserted, "I certify that I have seen," says

Jesus Vejar. The record establishes the truth of this assertion, for that document was copied into Castillero's ratification of the McNamara contract of *avio*, and there is in the record a certified copy of said instrument of ratification, made by Jesus Vejar on the third December, 1849.—*Trans.* 556.

When he speaks of the Mexican authorities which were governing in Upper California in 1846, he means simply to refer to the fact that in that year Upper California was yet under the dominion of Mexico. The words, *which were governing in Upper California in* 1846, are used parenthetically. If he had intended to refer to officers living in California, he would have called them the *local authorities of California*, as they were called whenever it was intended to discriminate between them and the authorities of the General Government. In illustration of this, see Castillero's proposals to the Junta de Fomento, and the Junta's communication of the fourteenth of May, 1846, to the Minister of Justice.

The idea of the certificate is this, that if the Notary before whom certain parties appeared, to have their contract extended—that is, written out in his book of protocols and duly executed—had not believed that this document bore the genuine signature of Castillo Lanzas, he would not have inserted it in the written contract—would not have copied it in his book of protocols. But finding it inserted in such authentic acts, Vejar says he believes, for that reason, the signature to be genuine.

What was to be gained on any score, by procuring a certificate in 1850 from Jesus Vejar, stating that he had seen the Castillo Lanzas document inserted in *actos*, relating to affairs of business, which were passed (*autorizado*) before Notaries in California?

As reference is made to such insertions solely for the purpose of showing that the Notary who made them must have considered Castillo Lanzas' signature genuine, it was obviously to the interest of parties that such insertions should have been made by Notaries in the City of Mexico, who would be much more likely to be acquainted with his signature than Notaries in California?

Mr. Vejar's second reason for believing Castillo Lanzas' signature to that document to be genuine is, that Castillero had acknowledged it to be so in documents which were passed before him, Vejar.

We find in the record four certificates signed by Jesus Vejar, the

object of each of which is to prove the genuineness of certain signatures; and in every instance the Notary is scrupulously particular in setting forth the extent of his knowledge of the signature in question, and the facts on which his belief depended. [See *Trans.* 315, 511, 549, 626.] There is, besides, a certified copy of the Castillo Lanzas grant, made and signed by Vejar on the thirteenth of November, 1849, and also a certified copy of the Castillero instrument of ratification, made and signed by him on the third of December, 1849. [*Trans.* 546, 556.]

The cause of the erroneous construction given to this certificate is to be found in the nature of the instrument to which it is appended. This Castillo Lanzas dispatch sets forth the grant of two leagues to Castillero, and *orders* the Governor to put him in possession of them. As soon, therefore, as we read in the certificate that this instrument has been respected and obeyed, we naturally jump to the conclusion that the order it contains has been obeyed—that Castillero was put in possession. I confess, that when my attention was first drawn to the certificate, I did not understand it. As soon as the true meaning occurred to me, everything was clear as day. And I am satisfied the Court will agree with me in my construction of it.

On the Weekes copy and the Vejar certificate, much stress has been laid by the Government. But like everything else on which the Government relies in proof of fraud, when understood, they are but evidences of the genuineness of our title.

VII. A copy of the deed from J. A. Forbes to William E. Barron, executed on the twenty-ninth of May, 1855, and conveying his remaining *barra* in the mine—consideration $30,000 in cash—will be found in the *Transcript*, p. 190.

VIII. Having satisfactorily, as we conceive, explained to the Court the Weekes copy of the *espediente* and the certificate of the Notary, Jesus Vejar, attached to the original Castillo Lanzas grant—the only circumstances in the prosecution of this case before the Land Commissioners which required explanation—we now proceed to the statement that James A. Forbes, on the twenty-ninth of May, 1855, conveyed his remaining *barra* in the mine to Mr. William E.

Barron, for the consideration of $30,000, making $54,000 in all for his two *barras*, besides his dividends.

In November, 1856, as appears by Forbes' testimony, he instituted proceedings in bankruptcy, and obtained his discharge in January, 1857. His liabilities were over $100,000.—*Trans.* 475.

He failed, owing Messrs. Barron & Co. over $3,000, and afterwards attempted to borrow from them $10,000, which, for reasons of their own, they refused to accommodate him with.

James Alex. Forbes then having nothing but himself to sell, sold himself to Henry Laurencel, who took the deed in his own name, but really made the purchase on the joint account of James Eldridge and himself. Let us read Mr. Laurencel's own words:

CROSS-EXAMINATION.—*Trans.* 378.

Ques. What did you pay Mr. Forbes for those papers?

Ans. I have already declined to answer that question.

[The Court requires the witness to answer.]

I paid Mr. Forbes $20,000 for the interest that I was acquiring in depositing these papers, and the engagment on his part to go to Mexico when I should request him to do so, and procure for me the proof of the fraud committed in this case, which he assured me he could procure. I was also to pay, if necessary, his traveling expenses.

Forbes' engagement to go to Mexico was doubtless fulfilled by his visit to General Castro, Governor of Lower California, in 1859. His business we will hear in General Castro's own words.—*Trans.* 2616.

At my residence (the Sausal de Camacho) I received a letter from James Alex. Forbes, dated at Don Juan Bandini's rancho, in which he stated that he had a matter of great importance to consult me about, and requested me to come at once to see him. I did so, and took my secretary with me. When we arrived, after the usual salutations had passed, Mr. Forbes and myself walked out together from the house, and he then stated to me that he was authorized by a powerful company of speculators (*empressarios*) in San Francisco to furnish me with the necessary means, if I would consent to detach Lower California from Mexico, to make it independent, and that subsequently it should be annexed to the United States. I listened to this calmly, and told him to go on. He then said, there is another matter of importance to you. If you will give your testimony

against the owners of the Almaden Mine, the Government will pay you a considerable sum—more than $10,000. I answered: "With regard to what you first proposed, I am an officer of the Mexican Government, and will not be guilty of treason; and as to the other matter, I cannot be bought with money to do an infamous action; say nothing further to me on the subject." We then returned to Mr. Bandini's house.

"I then went home, leaving Mr. Bandini an order directed to Forbes, stating that my duty, and his own personal safety, required that he should immediately leave the country. A few days after, I heard from Mr. Bandini that Mr. Forbes had left the day after he received my order.

"He said there was a fund here in San Francisco, out of which his expenses were paid.

To return to Laurencel:

Ques. Did you pay in cash?

Ans. I paid one-half in cash, and gave security for the other half. It is now due. *The contract was verbal.* I gave him a pledge before witnesses that I would pay him the money. The witnesses were Mr. Randolph, Mr. Crittenden and Mr. Gould. I promised him not to sell or hypothecate my rancho without paying him.

Ques. Why did you not put it (the contract) in writing?

Ans. I did not wish to. Mr. Forbes, I believe, was satisfied. Mr. Eldridge was not a party to the contract at the time it was made. He subsequently assented to it. I paid Mr. Forbes one half of $20,000, some time in March, 1857. Mr. Eldridge was then in Philadelphia. He assented to my contract on his return in May, 1857. He paid one-half; the whole amount was charged to the debit of our rancho.

I paid Mr. Forbes this money for the joint use of those papers. * * I did not understand that I purchased the sole use of those papers; the papers are used on this occasion without his consent. * * * I asked Forbes' consent to use them; he said he would consult counsel; after consulting he refused. * * * It was the peremptory condition of the first contract, that I should make the offer of compromise through Mr. Hall McAllister. * * * * *I endeavored to procure a compromise by means of these papers with the Almaden Mining Company; it was through Mr. Hall McAllister. They were also exhibited to Mr. Parrott for the same purpose.*

IN HIS ENDEAVOR TO COMPROMISE HE FAILED UTTERLY.

"The first contract was in writing. It was canceled at the time

I made the second contract. The second contract was in writing; I have destroyed my counterpart; it was in duplicate. *I destroyed it by the advice of counsel. I did not preserve a copy of either. I thought it would be inconsistent with the object with which I destroyed the papers.*"

Forbes and Laurencel differ in their accounts of this transaction. The former declares that he sold Laurencel the use of these papers to enable him to effect a compromise with the New Almaden Company, and that for such use of them he received $10,000 cash, and was to receive $10,000 more when the compromise was made.

Mr. Davidson, Mr. Laurencel and Mr. Forbes, all agree that the papers were deposited subject to the joint order of the two last.

The papers to be used only in compromise, and under no circumstances unless by the joint order—that was not so bad a bargain for Forbes. He thought he could take a few steps down into crime, get rich, climb out, and become respectable. He was mistaken. Like Dr. Faustus, he did not understand his master's character. Forbes reasoned in this wise: I get $10,000 cash, with the prospect of $10,000 more. For that I am willing to disclose to a few persons, whose interest is silence, my own villainous suggestions to my Tepic correspondents. I have deceived Laurencel, but he will never know it; for by the contract the papers can only be used in the attempt to effect a compromise. I know they are worthless as evidence in a court of justice, where they will be explained by other letters, and their apparent tendency as proof fully rebutted. But they can never get into Court without an order.

Mr. Forbes was thoroughly mistaken. The attempt at compromise having failed, Laurencel was not content to rest under his loss. His counsel, who is now the Government's special counsel in this case, acting then in concert with the District Attorney, caused a subpœna *duces tecum* to be served on Mr. Davidson; and in this way the Government captured Mr. Forbes' property, and did Mr. Laurencel the favor to break his contract for him.

Let me read Mr. Davidson's deposition. It deserves to be read for being the shortest in the case.

I read from page 375 of the transcript.

QUESTIONS BY THE DISTRICT ATTORNEY.

Ques. 1. Have you produced the box, as required by the subpœna *duces tecum?*

Ans. I have..

Ques. From whom did you receive this box?

Ans. From Mr. Laurencel and James Alexander Forbes. It was deposited subjected to their joint order with me for safe-keeping.

Cross-examined.—This box was deposited with me about six or eight months ago by Mr. Laurencel; Mr. Forbes came with him, I believe; I am not positive. It was distinctly understood that I was not to give it up except on their joint order. This was the distinct understanding. The box has been taken away once or twice on the written order of the parties; I cannot say when it was last taken away; one order was in writing; cannot say whether I can produce it.

The Judges of the District Court, I am sure, will never forget the conduct of James Alexander Forbes on that morning. They were both present. How he protested against the use about to be made of papers which were his private property. That scene occurred in open Court, and does not appear on record. I really thought, at the time, that the man was urged onward by such a regard for appearances as the most abandoned will sometimes show.

The Court will remember that Mr. Davidson and Mr. Laurencel were examined on the twenty-eighth of November, 1857; [*Trans.* 372] that Laurencel then swore that he had paid Forbes $10,000 in cash, and had agreed to pay him $10,000 more, secured by a verbal mortgage on his rancho.

Laurencel and Davidson were examined. Evidently Forbes was in too bad a humor to be trusted on the stand that day. The secret of his humor I will explain by and by.

The counsel for the Government not being permitted by the Court to prove the correspondence by Forbes' declaration to Laurencel, as he attempted to do, and Forbes being in a bad humor, Mr. G. W. P. Bissell was introduced to consume the day.

From the twenty-eighth of November to the fourteenth of December, James Alexander Forbes is still away, somewhere out of the record. He was in Court on the twenty-eighth of November, when Messrs. Davidson, Laurencel and Bissell were examined. Why was he not examined the next day?

He was here in the city of San Francisco on the second of December, receiving Laurencel's money, and Eldridge's notes with Laurencel's indorsement. But let him answer for himself.—*Trans.* 467.

Ques. What did Laurencel pay you for those papers?
Ans. For the use of those papers he paid me $10,000.
Ques. Was it in cash?
Ans. It was.
Ques. When?
Ans. In May last.
Ques. Was your agreement in writing?
Ans. It was.
Ques. Have you that copy?
Ans. I am not certain whether it is among my papers.
Ques. Are you not certain that it is among your papers?
Ans. It may be. It is probable it is so.
Ques. Why do you say you are uncertain whether you have it?
Ans. Because I have it not about me. It is probably in my house in Santa Clara.
Ques. Why then do you express a doubt on the matter?
Ans. Because there were two agreements, and I am not quite certain whether I destroyed both or not.
Ques. Are you not certain you destroyed neither.
Ans. I am certain I destroyed one.
Ques. How many agreements did you make?
Ans. I have already said I made two.
Ques. Have you received no more than the $10,000 spoken of?
Ans. Yes.
Ques. How much?
Ans. I can't state exactly, as I have not realized from it; probably a few thousand dollars. [In the course of a few answers it will turn out to be $10,000 in cash and notes.]
Ques. When did you receive this last amount?
Ans. I received a certain amount about a fortnight since.
Ques. How much?
Ans. A little over $2,000. [It was really $3,000, as he confesses in a little while.]
Ques. Was that received since Mr. Laurencel testified in this case?
Ans. Yes, sir.
Ques. Has it been as long as a fortnight ago?
Ans. I think about twelve or thirteen days.
Ques. On what account was that paid?
Ans. On account of money he testified he owed me.
Ques. How came he to owe you?

Ans. In accordance with his agreement with me.

Ques. Ten thousand dollars then was not the whole consideration?

Ans. I have stated it was not.

Ques. Does he now owe you anything on account of that purchase?

Ans. I am unable to state, as I don't know the result of certain negotiations now pending.

Ques. What is that negotiation?

Ans. The negotiation of certain notes.

Ques. Whose?

Ans. Notes for $3,500, drawn by James Eldridge, and indorsed by Henry Laurencel.

[We shall soon see that the notes were for $7,000.]

Ques. When are they dated?

Ans. December 2d, 1857.

Ques. Regarding these notes as worth their face, how much have you received from Laurencel?

Ans. Viewing the matter in that light, $20,000.

Ques. How do you make out $20,000?

Ans. *I received two notes for* $3,500 *each, and received* $3,000 *in cash.*

Ques. You were subpœnaed to appear here last Monday week; you did not appear: were you holding back to procure from Mr. Laurencel the payment?

Ans. *I was not holding back precisely as you state.* * * I was detained by illness in my family. * * *I am free to say that I have appeared here against my will.*

Of the truth of the last statement, I have not the least doubt. Forbes sold those papers to be used in the levy of a blackmail compromise. He hoped they might bring about that result, and was willing to run the chances. But he knew better than anybody else in the world, that as evidence in a court of justice they were worthless, and would so turn out. However, the Government had broken Laurencel's contract for him—and the papers which Forbes supposed nothing but his and Laurencel's joint order could take from Davidson's Bank, had been transferred thence into Court by force of a subpœna.

Such had been the course of events on the second of December, 1857. The past was inexorable. His disgrace and infamy were complete. On the twenty-ninth of November, it had been pub-

lished to the world, thanks to Laurencel's auxiliary subpœna; and three days after we find James Alexander Forbes evincing satanic powers of recuperation, engaged in saving from the wreck the $10,000 which Laurencel had sworn he owed him.

But why was he in so much haste to be paid? Why could he not wait until he had given his testimony? The answer to these questions is plain enough. Forbes expected the letters he had sold to Laurencel to be encountered on cross-examination by other letters of his own to his Mexican correspondents; which latter he knew would explain the former, directly contradict all inferences which Laurencel and his counsel had drawn from them, and utterly destroy their value as proof of fraud. The pay, then, must come before this examination, or never; for after that, Laurencel would have the best of all defenses to an action for the recovery of the $10,000, to wit: the fraud that had been practiced on him. Forbes' conviction under indictment for obtaining money on false pretenses would have been much the more likely result of a quarrel between himself and Laurencel. Such were Forbes' reasons for not obeying the *subpœna* on the twenty-ninth of November, 1857. If the writ of attachment which was sent against him did not find him, it was not because Laurencel was ignorant of his whereabouts.

But Forbes is paid, and he is about to come on the stand.

PART EIGHTH.

BEGINNING WITH JAMES A. FORBES' FIRST EXAMINATION, AND ENDING WITH HIS SECOND EXAMINATION, BOTH ON BEHALF OF THE GOVERNMENT.

I. His first examination.

When J. A. Forbes planted his foot on the witness stand, he stood committed to Laurencel and perjury.

With what pretense could he have first approached Laurencel with these choice pickings of his correspondence—with this eclectic bundle of papers—and demanded of him $10,000 in cash, for the use of them, and $10,000 more, if such use should be successful? Wherein consisted their value of $10,000 cash, and $10,000 contingent? Why did he so rate them? In his mind, what was their real value?

And Laurencel—he was not paying so much money for old rags and ink. He was buying, as Forbes was selling, *evidence*. On that basis alone *must* they have treated.

Evidence of what? Read the letters that came out of Davidson's box, and to this question you can find but one reply. Evidence tending to prove that in consequence of James A. Forbes' suggestions, set forth in a memorandum left in Tepic in May, 1849, the title papers produced by the claimants were in the year 1850 fabricated and antedated. *In their tendency to prove that fact consisted the sole value of these papers to Laurencel.*

As possessing that value, J. A. Forbes demanded, and Laurencel paid, so large a sum of money for them.

But seeing that these letters were but *parts* of a correspondence, as the letters themselves prove, would it not occur to Laurencel, the ablest litigant in America, perhaps, to inquire of Forbes, in the course of the treaty, if they were not contradicted, explained, or in some way rendered valueless as evidence by other letters or facts in the possession or knowledge of the claimant? What Forbes' answer must have been, is heard in the ring of the double eagles as Laurencel drops them in his canvas sack, for transportation to his coffers in Santa Clara, there to join God knows how much other fruit of swindling and perjury.

And as Mr. Laurencel is a very hard, shrewd, money-loving man, perhaps before he parted with his $10,000, he asked Mr. Forbes if he had any objection to put in writing what he had said about the value of these papers, and about their not being explained, qualified or contradicted in their apparent tendency as proof by any other letter or any fact whereof he had recollection. If Mr. Forbes had refused to comply with so reasonable a request, the bargain might have fallen through, and the $10,000 cash been lost. And so probably he did write such a statement. And then, as Mr. Laurencel is a very suspicious man, he might have asked Mr. Forbes to add to the obligations under which he already felt himself, by having the kindness to go before a Notary and make oath to the truth of his written statement. Neither could Mr. Forbes refuse that request; it was so reasonable, considering that Mr. Laurencel was about to pay him $10,000 in cash, and endeavor to make those papers bring him $10,000 more.

Be this so or not; when J. A. Forbes came on the stand *he* knew, whatever any one else might have believed, that he was summoned there to prove a lie. *He* knew, better than any body else, the value and tendency as proof of the letters he had sold to Laurencel, because that evidence was a stragetic idea of his own, for the practical execution of which he had deliberately and cunningly put together parts of a correspondence, selecting this letter and rejecting that letter in systematic villainy. As an illustration: let us for a moment overlook the man in his laboratory in Santa Clara. He has all the letters he received before him, and copies of all he wrote; his eclectic bundle, it will be remembered, contains many specimens of the latter. He has them all—letters received, and copies

of those he wrote—spread before him, arranged chronologically. He takes up first his letter of the thirtieth of January, 1846, in which he informs Mr. Eustace Barron that Castillero is working a quicksilver mine recently discovered by him [*Trans.* 540]. That letter he rejects. It may do harm, and can do no good.

He next takes up Mr. Alexander Forbes' letter to himself, of the eleventh of May, 1846 [*Trans.* 382]. That is better. It is a good initial to the eclectic bundle. It refers to McNamara, who is unpopular with the American Government, and shows that Alexander Forbes takes great interest in the mine. McNamara must come in by all means. He comes next to Alexander Forbes' letter of the second of September, 1846 [*Trans.* 382]. That also suits his purpose. Mr. Forbes still takes great interest in the mine.

He next examines his own letter of the twenty-second of September, 1846, to Alexander Forbes [*Trans.* 540]. That he rejects, because it shows that he was himself in possession of, and working the mine, and on the point of buying one-sixth of it.

He next takes up Alexander Forbes' letter to himself, of the seventh of January, 1847 [*Trans.* 383]. This will do, he says. It mentions Walkinshaw and documents, and asks my advice and assistance, which I can say I afterwards gave him in the Tepic memorandum. Misconstruction is possible; a little lying will make this a valuable document.

Next, he carefully reads his reply to the foregoing, dated fifth of May, 1847 [*Trans.* 842]. *Carramba!* he exclaims—for he must have sworn in Spanish—how unfortunate. By this letter I prove that in May, 1847, I saw a copy of the claimant's title, a notarial copy appended to Castillero's ratification of the McNamara contract; that I not only saw it, but so commented upon and criticised it, that I described it beyond the possibility of mistake. There can be no misconstruction of this letter—no amount of lying can pervert its true meaning. Here it is in black and white, that in May, 1847, I saw a notarial copy of the Castillo Lanzas dispatch—the very two-league grant which the claimants have presented. The villain must have smiled when he laid that letter aside, thinking how he was going to swindle Laurencel, and frighten the Almaden Company into a compromise.

He then comes to his letter to Alexander Forbes, of the four-

teenth of July, 1847 [*Trans.* 541]. "Here again I speak of this cursed two-league grant," he says—"and talk about having its limits established by survey, and about persons trespassing on the land. That too I will lay aside." And then we see him lay it on the rejected letter of the fifth of May.

He next takes up Alexander Forbes' letter of the first of October, 1847 [*Trans.* 348]. Ah! this is better; this will do. Mr. Alexander Forbes tells me he has just arrived in California, and that he has a thousand things to say to me, but must wait till he sees me. Capital!

Have I not gone far enough in this disgusting scene? He has reduced swindling to a system. He meditates it by day and by night. He continues it week after week. He plans his attack in cold, deliberate forethought, and executes it with the cunningest strategy.

Why need I refer to his letter of the twenty-eighth of October, 1849, to show the facility with which out of the raw material of a genuine letter he fabricates and forges a different one. Why should I seek in single letters precedents of forgery, to render probable that of the twenty-eighth of March, 1848—why should I seek by such small standards to gauge his capacity for crime, which is as broad as the road to Hell, after witnessing the scene in his home at Santa Clara, where he was building up, as the business of his life, as the foundation of his fortune, as the source of his daily bread to his last day, the most infamous plan of fraud and swindling that ever was chronicled in the records of a Court. That plan, the Government has adopted as their defense of this case, and this Court is asked to carry it into successful execution by their decree.

Was I not right when I said, that when James A. Forbes planted his foot upon the witness stand, he stood there committed to Laurencel and perjury?

But there he stands. He says he is there against his wishes, and I believe him. For he came there to sustain by his testimony the stragetic idea which he had devised to swindle Laurencel, and to force a compromise. He came there to sustain a story which he had himself concocted, and which he, better than anybody in the world, knew to be false.

He must have expected to be encountered by his own original

letters, the copies of which he had been so recently examining, while making up his bundle for sale. But he had been paid to be there; he was safe. He had his twenty thousand dollars in his pocket. The crime was his, not the folly. The folly was in Laurencel's getting the Government to break the contract, in taking out of Davidson's vault by a *subpœna* the bundle of papers which was never to have left it without his and Forbes' joint order, and in using as evidence in a Court of Justice certain picked and forged letters artfully and fraudulently combined, which it was agreed between Forbes and Laurencel should be used only in an endeavor to force a compromise with the New Almaden Company. For the latter purpose, Forbes thought they might be useful. As evidence, he knew they would be worthless. But of course he could not explain the matter to Laurencel, from whom he had already obtained $10,000 for those papers, their only value being their tendency to prove that Castillero's title papers were made in the year 1850. Laurencel was badly swindled in the first bargain, there is no doubt of it; and yet worse swindled, when he agreed to give Forbes for testifying willingly the ten thousand dollars which would have been paid him in the event of a successful compromise. It is delightful to observe how amicably these two individuals get along; how easily they adjust all difficulties. Laurencel's breach of contract by the *subpœna duces tecum* for instance: "Why, Mr. Forbes, don't be angry. True, I broke the contract; true, my Attorney told the United States District Attorney about these papers being in Davidson's vault. True, the *subpœna duces tecum* was thereupon issued, and your property was captured. But what's the difference; you shan't lose by the operation. I will pay you the $10,000, which in our first bargain was contingent on the compromise. I hav'nt the money by me just now. I don't like to give you note and mortgage; but here, in the presence of these gentlemen, I promise to pay you that sum, and on my honor I will consider it a lien on my rancho."

"Ah, Mr. Laurencel, you have made me the only reparation in your power. One gentleman cannot require more from another. I would prefer the money, but as you hav'nt it convenient I must give you time. The word of some men, Laurencel, is as good as their bond; but, you are so capital a fellow, that your word is as good as your bond and mortgage both. Let it be as you wish."

But Forbes, as we have seen, reconsidered this last bargain. He bethought him that cross-examination, and his own letters in our possession, would expose his villainy, and so clearly prove how he had swindled Laurencel, that he determined to get his second ten thousand in his pocket before he was examined. Laurencel, feeling how convenient it is to be on good terms with one's own witness, put him where the writ of attachment could not reach him, while they two were making arrangements to settle that little matter. They did settle it. Forbes pocketed his second ten thousand, and taking Laurencel's arm said: "Now, my dear fellow, all's right; I am willing to testify."

Thus prepared he took the stand.

[NOTE—I am spared the labor of making an argument on Forbes' testimony, showing in what gross falsehoods and contradictions he involved himself to carry out the plan of proving that Castillero's title papers were made in the year 1859, in consequence of the advice given in the Tepic memorandum, and how all his perjuries went to sustain that theory; for the counsel of the Government in the District Court, in his reply to my argument, expressed his great surprise that I should have attached any weight to the testimony of Forbes, whom he admitted to be a forger and a perjurer.

It is necessary, however, for the understanding of what follows, to say that Forbes declared on cross-examination that the letters he had sold to Laurencel constituted the whole of his correspondence with the parties in Mexico; and that the only letter of the witness in possession of the claimants at the time of the cross-examination, in which he mentioned the two-league grant, was that of the fourteenth July, 1847.]

Owing to the aspersions thus cast upon the claimant's title, a month or two after Forbes' examination I moved the Court for a commission to Mexico to take the depositions of witnesses, for the purpose of proving facts and documents. This motion the Court substantially denied, for the want of power under the Act of third March, 1851.

I then went to Washington to endeavor to have the Act of third March, 1851, amended, so as to confer on this Court a power so obviously essential to the ends of justice. A more reasonable application was never made to a Legislature. A more unjust law than the Act of 1851, as the Court felt obliged to construe it in deciding my motion, was never framed. But owing to the intervention of the Attorney General before the Judiciary Committees of the two branches of Congress, the amendment failed. The remedial process of a commission was denied us. Investigation was

to be suppressed. All the roads to truth were to be obstructed. The Attorney General had declared war against the claimants. The case was blockaded. The trial in this Court was to be a sham-trial. I speak it with due respect to the Court; for, however just in sentiment, and learned in the law a Court may be, it is manifestly impossible to render justice where the law denies a party the means of bringing into the record the facts on which his rights depend.

While I was in Washington, the agent of the claimant in California received from Tepic certain letters which James A. Forbes had written to Alex. Forbes and others. These letters were the following: *First*, the letter of the fifth May, 1847, to Alex. Forbes, in which James Alex. says that he has seen the copy of the two-league grant signed by Castillo Lanzas, ordering the Governor of California to put Castillero in possession of the land, and speaks of the juridical possession of the mine given to Castillero by the Alcalde, and the grant of 3000 varas as a gratification [*Trans.* 842]. *Second*, the letter of James Alex. Forbes to William Forbes, of the twenty-eighth October, 1849, where he renews for the first time the suggestions which had been made on the fifth May, 1847, for the fraudulent procurement of new title papers [*Trans.* 844]. *Third*, a letter of the twentieth December, 1849, in which James A. Forbes says to Messrs. Barron, Forbes & Co., "I know not what conditions Castillero may have proposed to the Supreme Government, but whatever they may have been, they cannot of course be fulfilled in California, by reason of the change of Government."—*Trans.* 846.

To prove these letters, Forbes had to be recalled for further cross-examination, and as an order was required for that purpose, the grounds of the motion were set forth in an affidavit, which I made on the twenty-third June, 1858, stating "That since James Alexander Forbes was examined in this cause on behalf of the United States, the affiant, as the claimant's attorney, has come into possession of certain documents which affiant used all due diligence to obtain before the said Forbes was examined, but failed so to obtain them." "*That said documents are material to rebut the inferences of fraud which the plaintiff will attempt to draw from the testimony of said Forbes; and will, when proved and put in*

evidence, utterly repel and refute all such inferences as affiant believes."—Trans. 834.

Here, then, was full notice to Laurencel and Forbes that their scheme of evidence was about to be defeated. To Forbes, the meaning of this motion to recall him was perfectly plain. He knew by heart the contents of the *documents material to rebut the inferences of fraud* which the claimants had recently come in possession of, and which he was to be called to prove; for we must remember he retained copies of his letters to his correspondents in Mexico, and but a few months before had been carefully examining them all. He was not surprised by the motion. *It is impossible he should not have anticipated it.* Laurencel too must have expected it. James A. Forbes' letter of the fourteenth July, 1847, [*Trans.* 541] offered by claimants on Forbes' cross-examination in December, 1857, after the scheme of evidence had been fully developed on the direct, and when Forbes' *contrivance* to prove that our title papers were made after April, 1850, was on record; proving, as it did, that in July, 1847, Forbes knew of the existence of a two-league grant to Castillero, must have shaken Laurencel's confidence in his statements, and in the value of the documents for which he had paid $20,000. *Yes, Forbes knew they were worthless; and Laurencel must have more than suspected it, when he read the letter of the fourteenth July*, 1847:

Mr. Forbes, how about that letter of the fourteenth July? What two-league grant to Castillero do you speak of? You told me that the two-league grant and all the papers emanating from the Supreme Government were made after April, 1850, and I have paid you $20,000 for evidence that tends to *sustain that theory and to disprove any other.* Come, explain what you said in July, 1847?

Don't be alarmed, Laurencel; It amounts to nothing. When Walkinshaw returned from Mexico he told me that old Forbes had told him, that Castillero had said, he had some sort of a two-league grant. I never saw it. It was a lie of Walkinshaw's and old Forbes.

How can that be, Forbes? Your letter of the fourteenth of July, 1847, was written while Walkinshaw was yet absent in Mexico. And in one of the letters I bought from you, it appears that Walkinshaw did not return till the first of October of that year.

Then, Laurencel, he must have told me of the grant before he

went to Mexico. I assure you on my honor, I had never seen the grant when I wrote that letter.

That won't do, Forbes. You are contradicting yourself just as you did on cross-examination. I think you have swindled me. I don't like that letter of the fourteenth of July; I would n't be surprised if the claimants were to find some more of your letters about that two-league grant, utterly disproving all that you have told me, and all that we have inferred from the papers that I bought of you.

Under the certainty of defeat of his nefarious plans did Forbes, and in the daily apprehension of it, did Laurencel, *live* and *contrive* from December, 1857, to June 1858, when the fears of the one, and the knowledge of the other, were verified by the affidavit and the order of the recall. Forbes did not regret the coming *dénouement*. It was the very harvest time of iniquity and money for him—and the crop was so large, as you shall see, that where he reaped, he permitted his poor Birnie to glean. A new plot; Forbes is prepared for it. We shall soon see what it is, and what have been the preparations.

On the thirtieth of June, 1858, after six days' notice of the grounds of his recall—how anxious Laurencel in the interval, and what consultations with Forbes!—Mr. James Alexander Forbes resumes the stand.

The letters were duly proved. The first, that of the fifth of May, 1847, shows that before its date James A. Forbes had seen a notarial copy of the very grant which the claimants offer as their title. The second, that of the twenty-eighth of October, 1848, shows that the alleged copy of a letter of the same date to the same person, which Forbes had sold to Laurencel, and which was put in evidence sworn to by him on his examination in December, 1857, was a forgery. The third, that of the twentieth of December, 1849, proving Forbes' ignorance of the nature of Castillero's propositions to the Supreme Government, explains why, after having seen a copy of the Castillo Lanzas dispatch of the twenty-third of May, 1846, the two-league grant, in which it is stated that the Supreme Government had appproved all Castillero's propositions, Forbes did not understand that the Supreme Government had ratified the acts of the local authorities of California. For it must be remembered that the Castillo Lanzas dispatch merely

refers to those propositions, and does not explain any one of them, except the proposition for a grant of two square leagues as a colonist.

Thus had Forbes' strategic idea failed. But Forbes was not answerable for it; for the bundle of picked and forged letters which he sold to Laurencel was never to be used except in attempt at compromise; never to be used in evidence in a Court of Justice; for Forbes knew that there might happen just what had happened, in the presentation of his own letters, giving the lie to the whole scheme which he had gotten up to swindle Laurencel and the New Almaden Company. Thus were Forbes, Laurencel, and all the Government's forces routed, and our title came out of the conflict with the prestige of clear victory.

Then imagine the interview between Laurencel and Forbes—the crimination and threats. "Mr. Forbes, you are a villain. I paid you twenty thousand dollars for a bundle of letters. I bought them as evidence to prove that the Castillero title papers were forged and antedated—to prove that you left a memorandum in Tepic in May, 1849, advising the procurement of such papers—to prove that in consequence of your suggestions such papers were actually made in the year 1850. And now it turns out that in April, 1847, you saw a notarial copy of the very grant which the claimant relies upon, and that grant proves every other paper in the case."

"Why, Mr. Laurencel, you are very unreasonable. I did not sell you those papers to be used in evidence—but only in the attempt to compromise. You *would* bring them into Court. *You* broke your contract with me. It was *your* attorney who told the District Attorney that the letters were in Davidson's vault, and sent that *subpœna duces tecum* to effect what we agreed should be done only by our joint order. This ridiculous failure is not my fault. I did not lay my plans with reference to evidence to be used in Court. I was merely trying to *allure* you, and *to frighten the New Almaden Company* into paying me money."

Such, truly, your Honors, was Forbes' first plan. To allure Laurencel and to frighten the Company, (a compound operation of seduction and blackmailing) he devised the Tepic memorandum, and forged letters to connect it with others which he really did write in and after October, 1849, thus devising plausible evidence

in support of an arrant lie. That lie was, that Castillero's title papers were forged and antedated, made in the year 1850, and he was obliged to select that date for the forgery, because the genuine letters which he had would contradict him if he had pitched upon an earlier one.

If, as I have no doubt was the case, Forbes had written and signed the statement which I have supposed that Laurencel exacted of him before paying him so large a sum of money, his situation after the introduction of the letters of the fifth of May, 1847, twenty-eighth of October, and twentieth of December, 1849, would have been very critical. Indeed, without any such statement, it is clear, that if Laurencel had chosen to prosecute him, he might have been convicted of obtaining $20,000 under false pretenses. I do not believe, however, that Forbes had any fears on the subject. He knew that Laurencel was too smart for that. He knew that Laurencel, despairing of the recovery of the money he had paid, would not for the mere purpose of revenge publicly admit that he had been swindled; publicly announce the great failure of his scheme to defeat our title; and thus openly abandon his only chance of acquiring the New Almaden Mine. Mr. Forbes knew that Laurencel's only passion is the passion for money—and that the extensive operations in the Fossatt claim to the mine, on foot in New York, would not, under any circumstances, allow Laurencel to prosecute him, Mr. Forbes, for cheating him out of $20,000. Forbes was right. Laurencel would much rather repair damages by dealing with others as he had been dealt by.

The question, then, between Forbes and Laurencel after the further cross-examination was: How shall we repair the damage? The first scheme has failed; what shall we try next?

"I have been thinking about that," said Forbes, "ever since you sent that accursed *subpœna duces tecum* after Davidson and the box of papers. I knew that the whole tendency of these letters as proof would be rebutted by others which I had myself written. On my first cross-examination I expected the claimants to produce my letter of the fifth of May, 1847, and several others. They had not then gotten it from Tepic, it appears. But they did introduce my letter of the fourteenth of July, 1847, in which I speak of the two-league grant, but not so precisely and fully as in

the other. When I was recalled for further cross-examination, this morning, I expected just what happened; just what I have been all along anticipating and preparing against. Listen, Laurencel: I have been for some months sending Birnie to Bolton, Barron & Co. to induce them to believe that I have important papers in my possession relating to the mine. I have told him to say to them that I can blow their title sky-high. And so I can; but I have already so much compromised myself in this business, and run so much risk of a prosecution—not from you Laurencel, you can't afford *that*—that I am determined to do nothing more in a matter in which I have no interest; and besides, I shall require Birnie's assistance. Birnie will do anything for me; but I have no means of paying him, and I don't like to involve him in the affair for nothing."

"I am aware of all that," replied Laurencel: "I do not wish or expect you to work for me without pay. But I can't exactly see how matters are to be set right. We have tried one scheme and failed, and if we contrive another, it seems to me that our motives will be suspected. I wish you had unbosomed yourself freely before that *subpœna* was issued. It would have saved us from our present awkward position. I confess it does not look well to try this thing *twice*."

"Never fear," rejoined Forbes: "I will see that all's right—that is, if we can agree on terms."

May it please your Honors, they did agree on terms—of course, this brace of villains; and on that very evening Forbes sent Birnie to William E. Barron to tell him that he (Forbes) had in his possession a letter from Mr. Alexander Forbes, written in 1848, declaring that Castillero's title papers were all made long after the Americans took possession of California; that Mr. Forbes would not sell that letter on any account—least of all to Laurencel who had treated him very badly. And the next morning, first of July, he sent again this Birnie to Mr. Barron, with a copy of that terrible letter, which Birnie insisted on leaving in Mr. Barron's hands. Mr. Barron brought that copy to me, and told me what Birnie had said.

Thus matters stood from the first until the fourteenth of July, 1858. Meantime, Laurencel and Forbes are much together. [*Trans.* 885, quest. 129 *et seq.*] They spend one whole day in driving about Santa Clara County. Laurencel, who speaks Spanish per-

fectly well, takes Forbes for an interpreter. The ostensible purpose of the jaunt is to inquire of some old Californians the whereabouts of Laurencel's own rancho, if we may believe Forbes. But some more *subpœnas* are out. The Deputy Marshal, Randall, is at Santa Clara with one for Forbes. He serves it on him. On the morning of the 13th of July, he, and Forbes, and Laurencel leave Santa Clara in Laurencel's carriage, for Oakland, where they arrived about nine o'clock at night—Mr. Randall has also a *subpœna* for Robert Birnie, who lives in Oakland. Mr. Forbes begs Mr. Randall not to serve it that night, giving as a reason that Birnie's wife, owing to her delicate situation, might be alarmed if she knew that an officer of the law had come to serve process on her husband. Remain at the hotel, says Forbes to Mr. Randall; I will go to Birnie's and tell him to meet you and the *subpœna* on board the boat in the morning.

And Forbes did go, and explained all to Birnie. I asked Forbes, "What did you say to Birnie?" Answer: "I told him it was expected of him that he would tell the truth." Fancy, your Honors, that sublime spectacle! James Alexander Forbes, weary and faint with travel, the ambassador of Truth accredited to Robert Birnie, seeks him in the dead of night, and counsels him not to stray from its path. I next asked him, "Who expected Birnie to tell the truth?" Answer: "*No person in particular!*" Quite correct, Mr. Forbes; and this answer of yours is sustained by the testimony of some twenty gentlemen, Birnie's neighbors, who declare they would not believe him on oath. Next morning, fourteenth of July, 1858, Birnie, true to his promise, went on board the ferry-boat, where he met Laurencel, Forbes, Deputy Randall and the *subpœna*. In a few minutes they reach San Francisco, and the special counsel of the Government is informed of their arrival.

He loses no time—(won't Birnie *keep* even for one day after Forbes' antiseptic lecture on truth? has he such a tendency to rot?)—but straightway seeks the District Court, and on motion obtains "leave to examine and take the testimony of Robert Birnie and James Alexander Forbes, witnesses in behalf of the United States, on giving one hour's notice to the counsel of the claimant!!!" Five days is the usual notice, but to expect Birnie to keep sound longer than one hour would be unreasonable. The coun-

sel for the United States so truly understood his witness, that I could find no reason to urge in opposition to this unprecedented haste. But if the Government was fast, the witness was faster.

Birnie takes the stand—says he made a copy, a true copy of a letter from Alexander Forbes to James Alexander Forbes, dated the twenty-eighth of March, 1848—gave the copy to Mr. Barron the day after Forbes' examination on his recall (which would be first of July, 1858) and knows Alexander Forbes' handwriting, etc. Counsel for Government offered in evidence another copy. I thought that was very strange.

On cross-examination Birnie said, that the first notice he had "was from a *subpœna* to appear here *instanter*. I came over in the boat yesterday—(he was now on his second day's examination) —with Mr. Randall, Deputy Marshal. Mr. Forbes and Mr. Laurencel were in company with the Deputy Marshal. I went to Mr. Forbes and asked him the object of this *subpœna* so suddenly; he told me that it was to testify about the copy of the letter I got from him, etc.—*Trans.* 861–2.

Poor Birnie! he was *too* smart. Conscious of guilt, full of the interview with Forbes in which the conspiracy and the perjury had been arranged, and impressed with the scene at his own house but two nights past, where Forbes had sought him, and refreshed him with the particulars of the plot, he saw the bearing of the question, and felt the importance of denying every fact which tended to prove the collusion. Hence, he says, he knew nothing about having to testify before the *subpœna* was served on him, and seeing Mr. Forbes at that moment on board the boat, he inquired of him the meaning of that sudden summons.

Forbes was present when Birnie testified thus. He was listening attentively, and of course anxiously; for he was on thorns. But when Mr. Forbes is examined a day or two afterwards, he contradicts Birnie—relates his visit to Birnie the night before he was *subpœnaed*—tells why he went to Birnie's house, and why the Marshal did not go; tells how he cautioned Birnie to speak the truth, and explained the object of his being summoned, and relates how Birnie agreed to meet him aboard the boat the next morning, and came according to promise in search of the Marshal and *subpœna*. —*Trans.* 875, ques. 27 to 53.

Forbes of course would have borne out Birnie in his lie, only there was the Deputy Marshal who knew of his visit to Birnie, and of Birnie's promise to be on board in the morning, ready for a *subpœna* and a trip across the Bay. He durst not deny his visit, but was forced for once to tell the truth.

Why should Birnie have perjured himself in this particular? Why should he have denied seeing Forbes the night before he came on the stand? Why should he have declared that he knew nothing about his being required as a witness for the Government, until he was informed of it by the *subpœna?* Why should he have said that when the *subpœna* was served on him in the morning, seeing Forbes on board the boat, he inquired of him the meaning of this sudden summons, and when informed of what he was to prove, upbraided Forbes for having betrayed him, and for compelling him to give evidence against gentlemen whom he was desirous of serving. The answer is plain. It was the natural impulse of the conspirator. The question reached the very core of the conspiracy, fixed its searching eye upon the scene of the plot, and was listening to its very words. So felt Birnie, and therefore lied about it as naturally as forgers and counterfeiters, surrounded by the implements of their criminal art, would blow out the lights when policemen break into their den; as naturally as a pickpocket on a steamboat would try to throw overboard the watch he had just stolen when the officer of the law lays hand on his shoulder. But we caught Birnie in the very act of throwing the watch overboard. His confederate was obliged to betray him; for the Marshal knew all about it.

[Well might the special counsel for the Government, Mr. Randolph, declare in argument in this case before the District Court of California: "IT DOES SEEM THAT BIRNIE LIED ABOUT THAT VISIT FORBES PAID HIM THE NIGHT BEFORE THEY CAME OVER THE BAY."]

The record discloses a singular connection in the testifying business, between Forbes and Birnie. They appear to be old partners in the trade. When Forbes was first examined in this case, in December, 1857, Birnie was with him all through this examination. [*Trans.* 858.] When Forbes is recalled for further cross-examination on the thirtieth of June, 1858, he telegraphs Birnie to meet him in San Francisco, and the summons is obeyed. [*Trans.* 874.]

And finally, they become so thoroughly identified in the business, that *subpœnas* issue in couples for them in July, 1859, and the Marshal on his way home with one of them, gets him to pick up the other—twin children of the father of lies.

And now I shall conclude what I have to say about this poor wretch, by calling the attention of the Court to the testimony of Daniel Small, Elam Brown, Andrew J. Coffee, F. M. Warmcastle, David Boss, Nathaniel Jones, B. R. Holliday, Nicholas Hunsaker, James L. Swaney, N. B. Smith, Edward Lee, M. R. Barber, W. V. Higgins, Edwin Baldwin, Daniel Hunsaker, William Ford, Calvin Boss, Henry Mathews, and John Sturgis—than whom no more respectable gentlemen can be found in any community—men of industry and substance, who have held high offices in State and County—old neighbors of Birnie's for five years, who know well him and his reputation—all of whom declare his reputation is so bad they would not believe him on oath. And when, on cross-examination, they are asked about their own knowledge of Birnie's acts and character, it is very fully shown that his reputation is right well deserved. The testimony of these gentlemen will be found in the *Transcript*, pp. 2755 to 2801. With this reference merely, I satisfy myself. If your Honors think that any testimony beyond Birnie's own is required to prove that he will perjure himself for money, and that he makes a business of perjury, and lives and loafs by it, read those depositions, and especially the cross-examination by the Government, and I am sure you will be satisfied of it.

So much for Birnie. Now for his twin-brother, Forbes.

[The Government's special counsel in California, in answer to me, said that he put Forbes on the stand as a forger and perjurer. Forbes himself, in his deposition, confesses that in making an answer in chancery he did perjure himself, and (quintessence of perjury!) he perjures himself in making that sworn confession. [*Trans.* 935, *answer* 415.] I will therefore pass him by very hastily, only dwelling long enough on him to explain the scheme, which, as the case may be considered a celebrated one, the public may be curious to learn.]

Forbes said he made a copy of a certain letter many years ago received from Mr. Alex. Forbes, dated Monterey, twenty-eighth March, 1848. That Robert Birnie, on the evening of the thirtieth June, 1858, (the day of Forbes' recall for further cross-examination by claimant) made another copy of the same letter after his (Forbes) examination was closed.

With charming simplicity, the counsel for the Government makes the following request:

Will you now please produce that letter?

FORBES—I cannot produce it; it is lost. It was abstracted from my carpet-bag at the Rail Road House, in this city, on the thirtieth June last.

COUNSEL—Do I understand you to say, that on the thirtieth day of June last, and after the conclusion of your examination before Judge Hoffman, and after you had suffered Birnie to make a copy of that letter, the said letter was stolen from your carpet-bag at your lodgings at the Rail Road House in this city?

FORBES—Yes; that letter was in my possession up to nine o'clock in the evening. I had occasion to leave my lodging for a short time; for security I took that letter out of my coat-pocket and put it in my carpet-bag, locked my room door, and went up as far as Montgomery street. I was absent half an hour or more; on my return I found my room door locked as I had left it; and on retiring to bed I had occasion to go to my carpet-bag, when I found that that letter was missing.

And here, I must refer to the remarkable circumstance, unparalleled perhaps in the trial of causes, that Birnie, hurried on the stand after an hour's notice to the claimant's counsel, is hurried off the stand, after swearing to the genuineness of an original letter, and to the accuracy of a copy of it—a letter which is the *second scheme* to establish fraud, and to destroy the claimant's title to property estimated by the Government to be worth $25,000,000—without the least intimation from the Government's counsel that he intended to prove the loss of that original letter, and the manner of its loss—thus letting off its own witness, the *only one* upon whom, as he said himself, he relied to prove that original, *but who did lie about that visit of Forbes*'—thus protecting him from cross-examination!

This Government forger, this Government perjurer, this swindler, this trader in false papers, this contriver of a plot for which he was paid $20,000, on the evening of the very day on which the villainy of his first scheme to defeat our title was thoroughly exposed, and the iniquitous plan utterly frustrated—this James Alexander Forbes devises another one, the weakest of inventions, the most transparent

of frauds, and the Government greedily adopts it, and calls upon this perjurer to prove it; calls upon this perjurer to prove that gentlemen, whose characters in all the respects of honor and honesty stand as high as that of the counsel for the Government, or as mine, or as anybody's, are burglars and thieves. SUCH IS THE GOVERNMENT'S SECOND SCHEME! May it please your Honors; this mode of defending a case is monstrous, hideous. Far better the outright spoliation engrafted in the barbarian law of conquest. Merciful were the Goths and the Vandals, and Attila the scourge of God, compared to your solemn treaty, with its sham trial, and all its hypocritical forms of justice. Take my property, but take it by force, and in Heaven's name put an end to this cancerous system of slander, and corruption, and perjury.

"Put an end to it? Oh, no," says the Attorney General; "on the contrary, we will use it, and encourage it to the utmost. This James Alex. Forbes and this Robert Birnie are our witnesses. Laurencel bought them, and gave them to us. There is no lie they can devise but shall stand uncontradicted, so far as the power of the Government can extend. If they fail in one lie, they may invent another. Try again, Messrs. Forbes and Birnie; never fear! The claimant shall bring nothing from Mexico to contradict you; the Government is backing you. Segura, and Flores, and Bassoco, the members of the Mining Board, shall have no voice in this case. Castillo Lanzas, the Minister of Foreign Relations, shall not be heard. Professors Balcarcel and Castillo can never tell what they know. Miranda, Velasco, Sotomayor, Duran, clerks in the public departments, shall never give their testimony. Neither shall Villalon the Notary, nor Negrete the merchant; not one word of testimony will we permit to be brought from Mexico. The District Court has denied the claimant a commission to Mexico—Congress has refused to amend the law—the Secretary of State has instructed our Minister to instruct our Consul not to mind the act of Congress about taking depositions—and he has refused to demand from the Mexican Government the papers to which we claim that our own is entitled—the President rejects all propositions for investigating the facts and documents in Mexico, and declines to make any stipulation whatever on the subject. Congress has passed a law making it a criminal offense to prosecute fraudulent claims—the burden of

proof rests upon the claimant—don't you see, Messrs. Forbes and Birnie, you have nothing to fear?—that the Government is with you—that while you are giving your depositions in California, I am writing my reports in Washington—that while you spread your story on the record, I am spreading mine before the public. Put an end to it? Oh, no!—the thing works admirably—our Fossatt Ministry is a unit—your depositions and my reports work admirably together."

May it please your Honors; every word I have said is in the record—except the Attorney General's private opinion of Forbes and Birnie—and that is supplied by the special counsel of the Government, who admits that they are both perjured.

Thus encouraged and instigated—thus shielded from punishment, and rewarded for crime—thus paid by Eldridge and Laurencel, who draw their supplies from New York speculators—thus protected by the Government with all its power, and countenanced by the reports of the Attorney General—is it surprising that these poor wretches, Forbes and Birnie—admitted perjurers, both of them—should be induced to come into Court with this paltry lie about the stolen letter.

They tell the Court this—our Government tell the Court this: We were mistaken at first, Forbes and ourself, in supposing that Castillero's title papers were made in 1850. Forbes has been reminded by certain letters of his introduced by the claimant when he was recalled on the thirtieth of last month, that he saw a notarial copy of the claimant's title in April, 1847, written in Castillero's ratification of the contract of avio. Our first position is no longer tenable. The bundle of papers which Laurencel bought, and kindly permitted us to use, has lost all value as evidence. It can no longer help us to defeat this claim. The truth is, as Forbes *now* tells us he knew from the beginning, that that bundle would be worthless in this Court: that he did not put it together for any such purpose; that his scheme was one of compromise. But he has prepared *evidence* this time; has been engaged for some months in the business, and is now ready to prove that all Castillero's title papers were made before 1848, but long after the Americans took possession of California. Unfortunately, the original letter of Mr. Alexander Forbes to *our* Forbes, in which a declaration to the fore-

going effect was made, has been stolen by some of those Almaden people; but Birnie preserved one copy of it, and *our* Forbes another, and we therefore ask permission of this Court to examine those persons. Does the Court understand? We repeat, we have changed our theory—the first one has been knocked in the head. We first asked the Court to find that the claimant's title papers were made after April, 1850. We now seek a different verdict; we desire the Court to find that his papers were all forged before March, 1848. We are not to blame, your honor; we have not been guilty of *laches*. *Our* Forbes says, that he remembered this letter of the twenty-eighth of March, 1848, and its contents, when he sold those other papers to Laurencel. But as he could n't conveniently lay his hand on it just then, and was much in want of money, he thought it would make no difference whether Castillero's papers were proved to have been forged after April, 1850, or before March, 1848. And, your Honors, there is really no difference. The gist of the thing is to prove the forgery—no matter when committed nor how proved. One thing more, your Honors: Laurencel says that he and the Marshal have just brought *our* Forbes and Robert Birnie to town; that *our* Forbes had a long talk with Birnie last night after nine o'clock, and he made a suggestion to us—the correctness of which we are sure your Honors will perceive—that any delay in the examination of Birnie "can only be injurious to the interests of the Government," and "cannot possibly be attended by any compensating benefit." We, therefore, ask your Honors for an order to take Birnie's testimony on one hour's notice to the claimant's counsel.

Such was the true position of the Government when they appeared before the Court on the fourteenth of July, 1858, on the motion for the order to examine Forbes and Birnie, except that they did *not* say a word about the letter of the twenty-eighth of March, 1848, having been stolen. That fact was not to be disclosed before Birnie was fairly off the stand. Until then it was to be carefully concealed.

I have given the outlines of this nefarious scheme. I have shown how James Alex. Forbes contrived with all the arts of forgery, suppression and combination, to get together a bundle of letters, in which many were genuine, from which many were excluded, and

which were so skillfully combined, that when he presented them to Laurencel for sale, that individual really might have inferred from them that our titles were made after April, 1850, consisting, as that bundle did, principally of copies of letters from James Alex. Forbes to his correspondent in Mexico, written in the latter part of the year 1849 and the first months of the year 1850, urging the fabrication of forged and antedated title papers. I have shown that Forbes contrived this seeming evidence, with the view of persuading Laurencel that it might be successfully used in forcing an advantageous compromise with the New Almaden Company, and so stimulated his hopes, that he agreed to pay $10,000 in cash for their use for that purpose, and $10,000 more in the event of a prosperous issue. I have shown that the agreement between Forbes and Laurencel—and it was one which Forbes was very careful to make, and has been equally careful to disclose—limited the use of the papers to effecting a compromise, with the further stipulation that they should never be removed from Davidson's vault without the joint order of both parties. I have shown that when these papers were exhibited to Mr. John Parrott, a member of the New Almaden Company, on Laurencel's offer to compromise, seeing through the whole scheme of fraud and deception, Mr. Parrott repulsed the offer, and the compromise failed. I have shown that James Alex. Forbes, refusing to permit these papers to be used in evidence in a Court of Justice, well knowing that they would be encountered by his own letters, and that all the inferences which he had designed should be drawn from them by Laurencel would be effectually disproved, the attorney of Laurencel, after the failure of the compromise, informed the United States District Attorney of their existence, at whose instance a *subpœna duce tecum* was issued against Mr. Davidson, and that in this way they were brought into Court. I have shown that when on the twenty-eighth of November, 1857, Mr. Davidson appeared on the stand, Forbes, who was in the Court under *subpœna*, protested violently against the use about to be made of papers which were his property, and demanded their delivery to himself. I have shown that Forbes then disappeared, and could not be found next day; that an attachment issued against him; that Laurencel, knowing where he was, would not tell, but was engaged on the second of December in paying him money

and giving notes—in all $10,000; and finally, that when Forbes had thus received $20,000, he came on to the stand to swear through the project of deception which he had devised to seduce Laurencel and to frighten the Company, and to complete by perjury his scheme of fraud.

I have shown that shortly after Forbes' examination the agents of the Almaden Company received from Tepic several of his letters, proving beyond the possibility of a doubt that he had seen a copy of the very document which the claimant relies on as his title, in the month of April, 1847, and that in a letter of the fifth of May, 1847, he had considered, commented on, criticised that title, and pointed out what he considered to be its imperfections, and that on the thirtieth of June, 1858, he was recalled for further cross-examination, and proved these letters. I have shown, that on the night of the same day on which this scheme of evidence which he had partly contrived and partly invented was overwhelmed with destruction by his own letters, he conspired with Robert Birnie, his familiar, his constant attendant in his examinations, certainly a quarter, probably a half-breed Indian, of one of the nations in Oregon, to *carry out* a second scheme of attack, [*months before planned in anticipation of the defeat of the first, which he knew from the beginning must occur*] for which he had been making his arrangements; that this *second scheme* was to prove the existence, loss, and contents of an alleged letter from Alexander to James Alexander Forbes, declaring that Castillero's title papers had been made long after the Americans had taken possession of the country. I have shown that in the execution of this second plot, Robert Birnie, on the evening of the thirtieth of June, was sent to inform Mr. Barron of the existence of such a letter, and on the next morning with a copy of it which he insisted on leaving with Mr. Barron. I have shown that Laurencel and Forbes immediately thereafter were in frequent, long, close converse; that they and the Marshal came up from Santa Clara to San Francisco, *via* Oakland, where late in the night of the thirteenth of July, Forbes had an interview with Birnie, and gave him his last instructions before taking the witness stand. I have shown, that on the next day, (the fourteenth of July) Birnie went down to the ferry-boat to meet the *subpœna;* that he, and Forbes, and Laurencel, and the Marshal crossed over to San Francisco;

that no sooner had he arrived than he was precipitately hurried on the stand, where he straightway denied the interview of the night before with Forbes, and narrated a scene with him on board the boat, intended to cover up the conspiracy; and that during the whole of Birnie's examination, the counsel for the Government kept the counsel for the claimant ignorant of his intention to prove that the alleged original letter had been stolen. With the testimony of these two witnesses your Honors are familiar; with the bald plot of the supper, and the carpet bag, and the theft, and Birnie's visits to Mr. Barron on the evening of the thirtieth of June, and the morning of the next day, each so happening in the very nick of time as to prove that the thief must have been one of the conspirators. Your Honors understand this miserable invention, so petty in the hands of perjured witnesses and their suborner, so atrocious in the use the Government makes of it, so ineffectual before this Court for all the vile purposes for which it was hatched.

And now, your Honors, with reference to this letter of the twenty-eighth of March, 1848, I will merely say that Mr. Alexander Forbes, in March, 1848, was in treaty with James A. Forbes for the purchase of the two shares in the mine belonging to the brothers Robles, in the course of which certain letters passed between them, to wit: one on the twentieth of March, from Alexander Forbes to James Alexander [*Trans.* 954]; another in reply to the foregoing, dated the twenty-second of March [*Trans.* 956]; a third from Alexander Forbes to James Alexander, dated the twenty-fifth of March, 1848 [*Trans.* 955]; and a fourth in reply to this last, dated the twenty-eighth of June, 1848, written by James Alexander Forbes after Mr. Alexander Forbes had left California. [*Trans.* 957.] Of course, the claimants had not in their possession the letters addressed to James Alexander Forbes; but they had the rough drafts of those letters which Mr. Alexander Forbes preserved, and left with his other business papers in Tepic, when he went to reside in London many years ago. These the claimants offered in evidence. They are in the handwriting of Mr. Alexander Forbes, and their careful preservation by him, among his business papers left behind him in Tepic, proves that they are copies of letters which he had despatched. If the Court will compare the copy of the letter of the twenty-fifth of March, from Alexander Forbes to James

Alexander, [*Trans.* 955] with the forged letter of the twenty-eighth of March, 1848, [*Trans.* 864] they will at once perceive that the latter is manufactured out of the former. And by referring to James Alexander Forbes' letter of the twenty-eighth of June, 1848, [*Trans.* 957] evidently written in answer to the last letter that Alexander Forbes wrote before he left California, it will be found that no reference is made to the terrible declaration contained in the forged letter of the twenty-eighth of March.

Nor is it referred to in any of the numerous letters which James Alexander addressed to Alexander Forbes on the subject of the title to the mine. It is preceded by nothing, it is followed by nothing bearing the least relation to itself. Its existence is disproved by everything that went before, and by everything that came after it.

If I were to dwell longer on this point, I would exhibit as little respect for the intelligence of the Court, as the Government did in asking them to believe in this paltry little machination—this plain cheat of the stolen letter.

The next thing the Government did was to file the Bill in Chancery, praying for an injunction and receiver by order of the Attorney General. That bill was not sworn to—no person is responsible for a single one of its allegations. It is a mere *pleading* drawn up by counsel, stating whatever the legal requirements of their case demanded, without regard to the truth of the statements. It is merely a *pleading*, I repeat. The counsel who signed it must have intended it as such; for two of them, Messrs. Stanton and Randolph, were the attorneys for the Fossatt claim, whose owners contend that the Almaden mine is on their land, while the bill in chancery declares that the mine is on the land of the United States, and from that fact deduces a right to the relief prayed for.

The bill charges fraud. The defendants denied the charge. Their denial was based on their information and belief. The sources of their information and the grounds of their belief were fully set forth, and were of the most authentic character. It was impossible, in the nature of things, for them to have denied the charge on their own knowledge. They did not see the *espedientes* written, nor the title signed. They were not merely pleading—they were testifying in their answer on oath. All the individuals interested

in the mine, who had a personal knowledge of the facts relating to its title, were residing in Mexico, and were not made parties to the suit.

The Court would not receive any evidence relating to the title, and granted the injunction because the denial of fraud was made on information and belief, and not on personal knowledge.

Who in California is safe; who any where is safe, if unsworn Government bills in chancery are thus omnipotent against every thing but a defendant's personal knowledge?

It is due to the gentlemen who have borne the *injury* of this injunction, to relieve them at least of its *odium*, by explaining the reasons why the Court felt constrained to issue it, and by showing that its true basis was the assertions of the counsel of the Government.

PART NINTH.

WITNESSES WHO PROVE CASTILLERO'S TRANSACTIONS IN MEXICO; AND DOCUMENTS IN THE MEXICAN ARCHIVES.

1. JOSE MARIA LAFRAGUA,

PRIME MINISTER OF MEXICO IN 1846.

Produced by claimant, on the twenty-ninth of January, 1855.

Mr. Lafragua, a lawyer by profession, was Minister of Interior and Exterior Relations, under President Salas, in the latter part of the year 1846; was afterwards a Senator of the Republic, and as is well known to the Court, Minister Plenipotentiary to the Court of Spain.

He proves that he made the report to the General Congress, in December, 1846, in which Castillero's discovery was mentioned. —*Trans.* 17, *Ques.* 7.

That he compared the copies of claimant's papers with their originals in the Mexican archives.—*Trans.* 16, *Ques.* 3.

Proves Castillo Lanzas' signature to the two-league grant.—*Trans.* 17, *Ques.* 6.

2. MANUEL COUTO,

CLERK AND SECRETARY OF THE JUNTA DE FOMENTO.

Produced by claimant, on the eighteenth of October, 1858.

Is Secretary of the *Administracion del Fondo de Mineria*, the

body which succeeded to the functions of the *Junta de Fomento*. —*Trans.* 996, *Ans.* 2.

Was Secretary of the *Junta de Fomento*, after 1852.—*Ibid*, *Ans.* 3.

Compared claimant's exhibits with their originals in Mexico, and proves handwritings in said originals.—*Ibid* 997, *Ans.* 17, *et seq.*

Copied Castillero's propositions to the *Junta de Fomento*, dated the twelfth of May, 1846, from a rough draft, at request of Castillero. Saw Castillero sign the clean copy.—*Trans.* 1000, *Ans.* 25.

Proves the law relating to the mode of authenticating documents to be used in foreign countries.—*Trans.* 1053.

3. JOHN P. BRODIE.

Produced by claimants, on the fourteenth of December, 1858.

Was sent from San Francisco by claimants to compare copies of their exhibits with the originals in the Mexican archives.

Mr. Forsyth, then our Minister to Mexico, and Mr. Glennie, British Consul, attended and assisted in making the comparisons. —*Trans.* 1060, *Ans.* 2 *et seq.*

4. JOHN FORSYTH,

UNITED STATES MINISTER IN MEXICO.

Mr. Forsyth's deposition was taken in Alabama, on the second of May, 1859, and was offered in evidence by claimant. I subjoin it entire:

"In the months of July and August, 1858, I was Minister of the United States of America to the Republic of Mexico, and residing as such in the City of Mexico. In the months of July and August, 1858, at the instance of Mr. Eustace Barron, of Mexico, who was one of the parties claiming an interest in certain quicksilver mines in California, known as the New Almaden Quicksilver Mines, I went in company with the British Consul in Mexico, Frederick Glennie, Esq., Mr. John P. Brodie of California, who had come as agent for the claimant of the mines, and the Licentiate Emilio

Pardo, first to the office of the Junta de Mineria, when and where was produced from the archives of said office an expediente, which being carefully compared with a copy in the hands of the said Pardo and Brodie, proved to be absolutely alike and correct in every respect, and to that copy I made a certificate, dated the fourth of August, 1858.

On the thirtieth of July, I was present in the College of Mines with the same parties, where Don Joaquin Valasquez de Leon produced an expediente before the same parties, which was compared with a copy in the hands of Brodie and Pardo, and found to be alike and correct in every respect, and was certified by me on the fourth of August, 1858. On the twenty-ninth of July, 1858, I was present at the office of the Ministry of Foreign Relations, when and where the Chief Clerk of the section of Europe, Don Manuel Larrañaga, produced from the archives of said office an expediente, which being compared before the same parties with a copy, proved to be in every respect alike and correct; and to that copy I certified on the fourth of August, 1858. On the same day I was present at the office of the Ministry of Government and Police, when and where the Chief Clerk of said Ministry, Don Ygnacio Anievas, in the presence of said parties produced from the archives of said office an expediente, which on being compared with a copy proved to be absolutely alike and correct in every respect. I certified to that copy on the fourth day of August, 1858. On the thirtieth of July, 1858, I was present at the office of the Escribano, or Notary Public, Don Juan Navarro, when and where said Navarro produced from the archives of his office a book, formed of sheets of stamped paper, stitched together and consisting (exclusive of the fly leaves in the beginning, and the index at the end) of one hundred and twenty leaves, and titled '*Año de* 1846. *Protocolo de Instrumentos Publicos, del Escribano* Don Nazario Fuentes.' In the presence of the same persons, certain original instruments, contained in said book, were examined, and being compared unto a copy found to be correct and similar, with the exception of two slight omissions; which were certified to by the said Notary on the same day. And to that copy I certified on the fourth of August, 1848.

These original documents were found in the several offices where they appropriately belonged, and were produced by the officers having the custody of them; and I saw nothing to cause me to doubt their being orignals. I, as Minister, certified each of the copies hereinbefore mentioned, and the facts set forth in these certificates are true, and the certificates are in accordance with the laws of Mexico.

The Government of Mexico will not allow the great seal of Mex-

ico to be attached to copies of such documents, nor will they allow the originals to be withdrawn. And the manner in which the copies herein mentioned have been authenticated is the only way in which such copies can be authenticated. The copies, so as above mentioned certified by me, are not now before me; but the printed volume hereto attached as a part of my deposition, and marked exhibit A, [illegible] purporting to contain printed copies of those copies, I believe [illegible] correct."—*Trans.* 1110.

JOHN FORSYTH.

5. VICENTE SEGURA,

PRESIDENT OF THE JUNTA DE FOMENTO.

From the time of the settlement of Mexico by the Spaniards to the discovery of the mine of New Almaden, the great *desideratum* of Mexico had been quicksilver. During the years of its dependence on Spain, that metal was a royal monopoly—a source of revenue to the Crown. And so strictly was the monopoly enforced, in favor of the great mine of Almaden, in Spain, which was, and is to this day, the property of the Crown, that in New Spain and Peru, by the Ordinances of 1783, the King reserved to himself the right to work, on his own account, all mines of quicksilver which might be discovered, promising suitably to reward the discoverers. Although the price of quicksilver was not fixed in entire disregard of the yield of the ores of the precious metals, to a part of which the King was entitled, yet it may be said, with truth, that the mining interest of New Spain had always been very seriously oppressed by the royal monopoly in quicksilver.

After the independence of Mexico, that country continued to feel the effects of the old monopoly. In fact the evil was only aggravated; for the price of quicksilver in the world was regulated by the Rothschilds, whose contract with the Spanish Government was such as to give them the disposal of all the metal extracted from Almaden in Spain; and as the right of the Crown to any part of the precious metals had ceased with the independence of Mexico, its simple policy was so to regulate the price as to secure the largest return of profit, without any view of increasing the product of the precious metals.

Therefore, we shall not be astonished to find that the Government of Mexico had addressed itself to the business of procuring, if possible, an abundant and cheap supply of quicksilver, from mines in the Republic; nor that the surprising richness of the specimens of cinnabar sent by Castillero from California, with his report of the abundance of the deposit, should have excited the enthusiasm of every Department of the Government, whose province it was to notice and act upon that discovery.

Without recurring to the earlier laws of the Republic designed to promote the discovery of quicksilver mines, and to facilitate its introduction and dissemination, I proceed to give a very brief sketch of the history and functions of the *Junta de Fomento*, (all of whose members are witnesses in this case) without which their testimony could not be properly appreciated.

The *Junta de Fomento y Administrativa de Mineria* was created by decree of second of December, 1842, [*Halleck's Col.* 434] and organized in 1843.

It consisted of three members: 1, an agent who represented and was elected by the creditors of the endowment fund; 2, an agent representing and elected by the miners; 3, a member appointed by the Government.

The Presidency was held in turns for one year by each of the members; the appointee of the Government being the first.

Señor Don Vicente Segura having been commissioned by the Government in 1843, was of course the first President of the Junta, and his turn came again in 1846, when Castillero's transactions took place.

Juan Maria de Bassoco was elected agent of the creditors of the endowment fund in 1843; was President in 1845, and again in 1848. He represented an interest of at least $5,000,000.—*See his Deposition, Trans.* 1216, 17, 19; *Ans.* 14, 32, 50.

Juan Maria Flores was elected agent of the miners in 1846, and was President in 1847.—*Trans.* 1216; *Ans.* 20, 31.

The principal duties of the Junta may be divided into three heads.

First, to collect and disburse the endowment, and the quicksilver funds.

Second, to purchase and keep on hand a large quantity of quicksilver, that an unfailing supply of an article so essential to the

mining interests of Mexico might not be jeoparded by the chances of war, or the casualties of foreign trade.

Third, to encourage the discovery of quicksilver mines by rewards; to test, by fair experiment, the resources of such as might be discovered, by lending money for that purpose, or by becoming a partner in the enterprise; and to stimulate the production of quicksilver, by offering bounties and premiums on every pound extracted from any mine in the Republic.

On the seventeenth of February, 1843, a decree was made authorizing the *Junta de Fomento* to make a loan of two millions of dollars for the purpose of contracting with the Spanish Government for the quicksilver of Almaden.—*Halleck's Col.* 447.

Another decree of twenty-fourth of March, 1843, is in these words.

"That in accordance with my intentions to encourage whatever may contribute to the national aggrandizement and wealth, and considering as one of the means most suitable for that purpose the granting of rewards, and exemptions to the mines of quicksilver, so necessary for the reduction of the precious metals, the most important branch of the industry of the Republic, without which the others can make no progress, having heard the report of the *Junta de Fomento*, exercising the powers granted to me, &c., * * I have been pleased to decree the following.

"ARTICLE I. That the Royal orders of January 13th, 1783, of November 12th, 1791, of December 6th, 1796, and of August 8th, 1814, with respect to exemption from excise duties (*alcabala*) granted to articles of consumption in mining, be punctually observed with respect to mines of quicksilver in the Republic.

"ART. II. No general or municipal import shall be levied on quicksilver extracted from the mines of the Republic.

"ART. III. Quicksilver may be sold throughout the nation without permits, passes, or other Custom House papers.

"ART. IV. A premium of $25,000 is granted to each one of the first four operators (*empressarios*) who shall extract in one year, from the mines of the Republic, two thousand quintals of liquid quicksilver.

"ART. V. There shall be paid, for the term of three years, for each quintal [hundred pounds] of quicksilver which shall be derived from the aforesaid source, the sum of five dollars.

"ART. VI. The operatives in mines of quicksilver are exempt from all military services, and from personal taxes.

"ART. VII. The *Junta de Fomento* will draw up the proper regulations for the distribution of said premiums, &c."—*Halleck's Col.* 452.

And again, on the fifth of July, 1843, by another decree, the *Junta de Fomento* was authorized to work, and contract for supplying mines of quicksilver in the Republic. It was also directed to send intelligent persons to *search for good mines of quicksilver;* to cause those already discovered to be examined: and to dictate such partial measures as experience may suggest, in order that the production of quicksilver in the Republic may be efficaciously encouraged.—*Halleck's Col.* 455.

On the twenty-fifth of September, 1843, by another decree, the *Junta de Fomento* were directed to appoint one Commission at least for each department of the Republic, to explore and examine all the deposits of quicksilver which may be there. The decree then proceeds to declare upon what terms, and to what extent, such mines might be aided by the *Junta de Fomento* with the quicksilver fund.—*Halleck's Col.* 483.

The result of the investigations ordered by the foregoing decree was communicated to the Government by the *Junta de Fomento* on the twenty-second of February, 1845, in a report of that date. It will be found in *Trans.* 1819. It is signed by Señor de Bassoco, who in that year was President of the Junta. He says:

"The mines of the country being worked by the public administration, and by private enterprise, we will perhaps see realized the flattering prophecy of Baron Humboldt, as to America not needing the importation of foreign quicksilver. But some years must yet pass before the nation will be in a condition to enjoy such advantages—meantime, it must furnish itself with enough of that article to meet the demand of consumers, which cannot be supplied from Mexican deposits alone."—*Trans.* 1856.

The flattering prophecy of Baron Humboldt was nearer its fulfilment than Señor de Bassoco supposed. For in less than a year after he had written his report, Andres Castillero discovered the mine of Santa Clara, now called "New Almaden"—the spot where Nature, lavish of her bounty, has placed the complement of the mineral wealth of Mexico, California and Nevada.

How natural, then, that Señor Ramon del Moral, the friend of Castillero, (and, by the way, it is proper to mention that he was a member of the Commission appointed by Government in 1841 to draw up a new body of mining laws, *Halleck's Col.* 425, and was also Director of the National College of Mining, in 1845, *Bassoco's Dep., Trans.* 1231) should have requested Herrera, late President of Mexico, to furnish him with extracts from Castillero's letters, and should have presented them, with the specimens sent by the hands of Piña, to the *Junta de Fomento*, and made known to that body the glad tidings of Castillero's discovery. How natural that the Junta should take immediate steps to ascertain the richness of the specimens, by sending them to the Mining College for assay. How natural that Professors Castillo and Balcarcel, as they declare in their depositions, on seeing those specimens and hearing the particulars of Castillero's discovery, should have been struck with the fact that this great mine had been found in one of the few departments of the Republic to which no Commissioners had been sent to search for mines, as required by the decrees of the fifth of July and twenty-fifth of September, 1843. But I must return to my witnesses.

Mr. Segura's deposition was taken in Mexico, and will be found on pages 3107, &c., of Transcript. He knew Castillero well. Remembers the transaction between him, the Junta, and the Government, in 1846. Signed the several letters relating thereto, addressed to the Director of the College of Mining, and to the Minister of Justice. Received the answers of the Director, Tornel, and of the Minister, Becerra. In fine, Mr. Segura thoroughly proves this case. I hope the Court will read his deposition. He concludes it thus: "That defendant has many times repeated what is above stated to the parties in interest, who urged him pressingly to go to testify to it before the tribunals of California, which he could not do, by reason of his advanced age and infirmities."

6. JUAN MARIA FLORES,

MEMBER OF THE JUNTA DE FOMENTO.

Deposition taken in the City of Mexico. To be found in Transcript 3123 *et seq.*

Was a member of the *Junta de Fomento* in 1846, elected by, and representing the miners. Saw Castillero in the office of the Junta, in May of that year. Conversed with him about his discovery, and narrates generally his transactions with the Junta and the Government relative to this mine. Concludes thus: "It is true that I was solicited to proceed to California to testify to the truth of the facts stated in this interrogatory, and that with great regret I was unable to render this service to Mr. Barron, because neither my age nor my broken health permitted me to make so long a journey."

7. JOSE MARIA DE BASSOCO,

MEMBER OF THE JUNTA DE FOMENTO.

Produced by claimant, on the first of June, 1859.

He was examined in Court, and his deposition written down by his Honor, Judge Hoffman. Señor de Bassoco is a Spaniard of noble birth, possessed of singular cultivation and intelligence. He came over from Spain to Mexico to join his uncle, the Count de Bassoco, a man of great wealth. His own fortune is good. When he was examined in this case, he was in his sixty-fourth year.

On his cross-examination he was asked about four hundred questions. His deposition begins on page 1214 of the Transcript.

He was for six or eight years a member of the *Junta de Fomento*, representing the creditors of the Mining Fund.

I can do no more than refer the Court to his deposition, which is very interesting and consistent throughout.

His testimony bearing upon the matters in controversy is conclusive of the case.

Proves Lafragua's report, and that of the *Junta de Fomento*, which accompanied it.—*Ans.* 114 *et seq.*, *Trans.* 1232.

Proves the mode of conducting business in the *Junta de Fomento*, and how the minutes of their proceedings were kept. Also proves the copies of those minutes offered by claimant.—*Ans.* 15, *&c.*, *Trans.* 1219 *et seq.*

8. BLAS BALCARCEL,

PROFESSOR IN THE NATIONAL COLLEGE OF MINING.

Produced by claimant, on the twenty-eighth of June, 1859.

Deposition begins on page 1865 of Transcript.

Mr. Balcarcel was appointed to a Professorship in the National College of Mines, in Mexico, in 1844. In 1847 and '48 was Director of the College, in the absence of Tornel. In 1856, was Director, *ad interim*, and afterwards permanent Director of the College.

Was a member of the *Junta Facultativa* of the College, in 1846, to which Tornel, the Director, referred Castillero's specimens of cinnabar for assay.

Remembers the box of specimens sent by Castillero to Moral. It was opened in the witness' room in the College.—*Ans.* 35.

Mr. Balcarcel's deposition is so clear and precise, and it relates so many particulars of these transactions, that no summary I could give the Court would do justice to his testimony.

9. ANTONIO DEL CASTILLO,

PROFESSOR IN THE NATIONAL COLLEGE OF MINING.

Produced by claimant, on the fifteenth of July, 1859.—*Trans.* 1935.

Mr. Castillo has been Professor of Mineralogy for many years, in the National College of Mining. Was so in 1846. In same year was member and Secretary of the *Junta Facultativa* of the College. [*Ans.* 6.] Received, labelled and deposited in the Cabinet of Minerals belonging to the College, the specimens of cinnabar which Castillero sent to Mexico in 1846. Knew Castillero; remembers his transactions with the Government in 1846, &c.

10. CASTILLO Y LANZAS,

PRIME MINISTER OF MEXICO.

Produced by claimant.—*Trans.* 2229.

Was Chargé d'Affaires to the United States, from 1833 to 1837.

Was Minister to England, from 1853 to 1856.

Was Prime Minister of Mexico, first in 1846, and again in 1858.

Proves Castillero's two-league grant to be in the handwriting of Mr. Velasco, a subordinate officer in the Ministry of Relations, and to bear the genuine signature of the witness himself; and that it is in all respects a true and genuine document.—*Ans.* 26.

Proves Lafragua's report.—*Ans.* 56, *Trans.* 2238.

Explains the mode of conducting business between the various Ministries, and shows how the *espedientes* and documents in this case took their particular form.—*Ques.* 58, *Trans.* 2238.

11. AUGUSTIN JIMENES DE VELASCO,

CLERK IN THE MINISTRY OF RELATIONS.

Produced by claimant, on the twenty-ninth of August, 1859.

Was *escribiente* in the Ministry of War in 1842, where he remained for six months, and was then transferred to the Ministry of Relations, and was fourth *escribiente* there in 1846. Was afterwards attached to the Mexican Legations in Central America and the United States.

Proves the two-league grant to be in his own handwriting; and the signatnre thereto genuine.—*Ans.* 3 *et seq.*, *Trans.* 2200.

12. JOSE MARIA YRISSARRI,

CLERK IN THE MINISTRY OF JUSTICE.

Produced by claimant, on the thirtieth of July, 1859.

Entered the Ministry of Justice, in 1834, as a clerk, and has continued there ever since.

Proves the extract from the book in the Ministry, in which the substance of communications was noted, and the resolutions, or decrees of the Government copied. The extract from this book offered by claimant is a copy of the decree written by Becerra, Minister of Justice, on the margin of the official letter from the *Junta de Fomento*, of the fourteenth of May, 1846. The decree, signed with the rubric of Becerra, is in these words:

"May 20th. It is granted in the terms proposed; and as regards the land, let the proper order issue to the Minister of Relations, for the measures which it belongs to him to take, with the understanding that the Government assents to the petition."

Mr. Yrissarri proves that this decree was recorded by himself in the book referred to.—*Trans.* 2113, *Ans.* 24, *et seq.*

13. MARIANO MIRANDA,

CLERK IN THE MINISTRY OF JUSTICE.

Produced by claimant, on the eleventh of August, 1859.

Was clerk in the Ministry of Justice in 1846. Knew the Minister Becerra well. Becerra was at one time Bishop of Chiapas, and afterwards Bishop of Puebla. He died in 1854.—*Ans.* 4, *&c.*, *Trans.* 2147.

Witness would sometimes act as Becerra's amanuensis.—*Ans.* 11, *Trans.* 2149.

Knows and proves his signatures.

The body of the letter from the Minister of Justice to the Minister of Relations, dated the twentieth of May, 1846, informing the latter that the President had granted Castillero two square leagues, and directing him to issue the proper orders, is in the witness' handwriting.—*Ans.* 17, *Trans.* 2152.

14. FRANCISCO VILLALON,

NOTARY PUBLIC.

Produced by claimant, on the eleventh of October, 1859.

To understand Mr. Villalon's testimony, we must remember that in December, 1846, Castillero, by a public act, passed before Nazario Fuentes, ratified the contract which McNamara had made with Alexander Forbes in Tepic; and in the same instrument leased to Mr. Forbes the two square leagues of land around the mine of which the Government had made him a grant.

We must further remember that this two-league grant was copied *verbatim* in the instrument of ratification.

Now, of this instrument two copies were issued, under the hand and seal of Nazario Fuentes, one in December, 1846, and the other in February, 1847, both attested by three Notaries Public, under the seal of the National College of Notaries. One of the attesting Notaries to each copy was Mr. Villalon. He proves the certificate and the seal.—*Ans.* 14, *&c.*, *Trans.* 2555.

15. FRANCISCO MARTINEZ NEGRETE,

MERCHANT.

Produced by claimant, on the thirtieth of September, 1859.—*Trans.* 2394.

Mr. Negrete is a Spaniard by birth, and a merchant of great wealth, residing in the city of Guadalajara. He was for many years the intimate friend of the late Mr. Eustace Barron, to whom he promised, on his death bed, that he would come to California to testify in the case. If I were permitted to go out of the record and speak of Mr. Negrete's character, I would with sincere pleasure pay the tribute due to his incorruptible integrity, to his nice honor, to his clear and upright character, abounding in all manly and gentle virtues. But this I can say of him, for it is disclosed by the record, that an old man sixty-two years of age, without reward, and solely to protect the interests and to vindicate the character of a dying friend, he left his family and business for many months, and encountered all the hardships and dangers of a journey from the City of Mexico to San Francisco.

"How could you afford to take so long a journey, and be absent from home so long, without being paid for it?" inquired the Govment's special counsel.

"Because I was a friend of Mr. Barron's, and I had enough to live on without asking or receiving anything from him: if I had been offered anything for coming, I would, perhaps, have refused to come."

"From that, I understand that you are a man of wealth, inasmuch as the other witnesses, without reference to their social standing or political position, have all testified that they were all to be paid for their trouble in this matter?"

"I have means enough to maintain a large family, according to our custom," replied Mr. Negrete.

"It is of some little importance," continued the counsel for the Government, "to know what are the circumstances of a witness; and without going into particulars, please say whether I am correctly informed that you are a man of wealth?"

"I cannot say," replied Mr. Negrete, "whether I am a man of wealth or not, because every thing in this world is relative. I might be considered a man of wealth in Guadalajara, and not be so considered in San Francisco. I have a decent fortune."

"Nor are you in any way benefited in your business by putting yourself to the inconvenience of the voyage?"

"I am not according to my understanding. It is merely the service that one friend would render another—especially as I supposed the time required would not be over two months, in which, however, I have been disappointed."—*Trans.* 2407.

The importance of Mr. Negrete's testimony it is difficult to overrate; for it establishes the existence of the two-league grant in December, 1846, beyond the reach of doubt.

In that month, Mr. Negrete being on a visit to the City of Mexico with his family, was requested by Alexander Forbes, who resided in Tepic, to purchase for him from Castillero some shares in the mine. During the pendency of this business, Mr. Negrete wrote almost daily to Mr. Forbes, giving him an account of his progress, describing Castillero's character, transmitting his terms, and advising as to various particulars. The letters are in evidence duly proved. Translations found in the Transcript, pp. 2485 to 2497, and to them I particularly refer the Court.

During the progress of this negotiation in Mexico, McNamara, under the power of attorney from Gen. Castro, had concluded the contract of *avio* with Mr. A. Forbes, in Tepic—a copy of which was sent to Mr. Negrete. It being apparent that McNamara had no power to bind any owner of the mine except Castro, Mr. Negrete concluded to postpone the purchase of the proprietary shares, or *barras*, until the contract of *avio* had been submitted to Castillero, and his ratification of it agreed to.

This was soon afterwards done. The instrument of sale of five *barras*, and the instrument of ratification of the *avio*, were drafted

by Mr. Romero, a lawyer, employed by Mr. Negrete; extended in the Protocols of the Notary Fuentes: and duly executed on the seventeenth of December, 1846, Castillero signing for himself, and Mr. Negrete for Alexander Forbes.

Castillero agreed, not only to ratify the contract of *avio*, but also to lease to the company the two square leagues around the mine of which the Supreme Government had made him a grant, to supply wood for his furnaces. This grant he exhibited to Mr. Negrete, and with other papers it was handed to Mr. Romero to assist him in preparing his draft of the instrument.

The two-league grant was copied in the instrument of ratification, and then delivered to Mr. Negrete, who sent it to Alexander Forbes, on the eighteenth day of December, 1846. See Negrete's letter of that date, [*Trans.* 2491] and his statement.—*Trans.* 2401, *Ans.* 32.

At the same time, Mr. Negrete sent by mail to Mr. Forbes the *originals* or *primordials*, as they are called, of the acts of sale and ratification, being "the first copy which is accurately and faithfully made from the *matrix* writing, or protocols, or register, by the same Notary before whom the Act passed," and to which each party to a contract is entitled. See Negrete's letter, nineteenth of December, 1846, [*Trans.* 2493] and his deposition.—*Trans.* 2401, *Ans.* 32.

Other copies of the same instruments were sent by Mr. Negrete to Mr. Forbes, in February, 1847. See Negrete's letter of that date, [*Trans.* 2496–7] and his statement in his deposition.—*Trans.* 2402, *Ans.* 34.

These two copies of the instrument of ratification of *avio* are in the record. They were submitted to Mr. Negrete, with the original two-league grant, and identified by him.—*Trans.* 2402, *Ans.* 35 and 36.

One of these copies—that transmitted on the nineteenth of December, 1846—was brought to California by Mr. Walkinshaw, who arrived in March, and took possession of the mine as the agent of the lessee, in April, 1847. [*Vide* pp. 46–8 of this argument.] And it is alluded to in Mr. Alexander Forbes' letter to James Alexander, of which Walkinshaw was the bearer, dated Tepic, January 7th, 1847, where he says: "I had, previous to the receipt of your letter, been in treaty with Don Andres Castillero, respecting this

mine, and on the arrival of Mr. McNamara with powers from the other proprietors the treaty was much facilitated; and I am now happy to inform you that I have contracted for the habilitation of the mine, and have also purchased a part of Mr. Castillero's "*barras*," all of which will be made known to you by Mr. Walkinshaw, who goes to California as my attorney and agent for the examination and working of the mines. Mr. Walkinshaw will wait upon you as soon after his arrival as possible, and will show you all the documents, and ask your advice and assistance in carrying out my views."—*Trans.* 338.

Mr. Negrete happening to be in the City of Mexico when he agreed to come to California to give his testimony, went to his old bankers, and there discovered the drafts he had drawn in payment of the various expenses attending his said transactions. These drafts are in evidence. They were drawn on Señor Don Donato Manterola; the first dated the eighteenth of December, 1846, in favor of Castillero, for $4,000, the price of the five *barras* at $800 each; the second, dated the twenty-second of December, 1846, in favor of Nazario Fuentes, the Notary, for one hundred and thirty-seven dollars and twenty-five cents; the third, dated the sixth of February, 1847, in favor of same, for seventy-five dollars.—*Trans.* 2484, and 2396–7, *Ans.* 15, *&c.*

16. TEODORO SOTOMAYOR,

CLERK IN THE MINISTRY OF JUSTICE.

Deposition taken in the City of Mexico, in 1850. A translation of it to be found in Transcript 3102.

Entered the Ministry of Justice and ecclesiastical affairs, in 1829, and has remained there in various capacities ever since. Proves espediente in Ministry of Justice. Was well acquainted with Becerra, Minister of Justice in 1846, and Bishop of Chiapas. Mr. Becerra was afterwards Bishop of Puebla, where he died.

Proves that the communication from the Minister of Justice to the President of the *Junta de Fomento*, dated the twentieth of May, 1846, in which the Supreme Government approves the contract proposed by Castillo, is in witness' own handwriting, and in all respects genuine.

17. MARIANO RODRIGUEZ.

CLERK IN THE MINISTRY OF JUSTICE.

Deposition taken in the City of Mexico, in 1859.

Witness was seventy-one years old, and unable to travel to California, on account of his age and infirmities.

Was in the Ministry of Justice, in various clerical positions, from 1821 to 1852, when he was pensioned off.

Proves our espediente in Ministry of Justice, also the Book of Record in which the decree of concession was written.

Knew Señor Don Luciano Becerra, Bishop of Chiapas, and Minister of Justice in 1846. He was afterwards Bishop of Puebla, where he died in 1854.—*Trans.* 3104.

18. JOSE MARIA DURAN.

CLERK IN THE MINISTRY OF JUSTICE.

Deposition taken in the City of Mexico, in 1859.

Witness was over seventy-five years of age. "By reason of my advanced age and infirmities, I did not consent to proceed to California to give this testimony before the tribunals, when twice earnestly invited to do so."

After having filled several offices under the Spanish Government in Mexico, from the year 1811, witness entered the service of the Mexican Government, at the first establishment of the Departments of State, as Keeper of the Records in the Ministry of Justice and Ecclesiastical Affairs.

Was promoted to various clerkships, and filled the office of Minister, *ad interim*, as many as fifteen times.

In January, 1854, on account of his age, infirm health, and long services, he received a pensioned discharge.

Was in the Ministry of Justice, in 1846, when the *Junta de Fomento* corresponded with the Government, on the subject of Castillero's discovery and propositions for aid, which fact he recollects.

Proves handwriting of marginal decree on Castillero's propositions, and various others.

Knew Bishop Becerra very well. He was Bishop of Puebla, in 1854, when he died.—*Trans.* 3116.

PART TENTH.

And now, for the convenience of the Court, I furnish them with the following summaries and indices :—

Proof of the Facts of Registry, Possession, and Working of the Mine.

There are two written statements in registry made by Castillero.

The first is dated twenty-second of November, 1845, when Castillero thought that the ore contained gold and silver.

The second, dated third of December, 1845, after he had discovered that the ore contained large quantities of quicksilver.

The juridical possession was given by Pico on the thirtieth of December, 1845. The two assisting and subscribing witnesses to act of possession are Antonio Suñol and José Noriega.

For proof of these papers, see brief of testimony on the genuineness and custody of the Espediente of Registry and Possession in the Recorder's Office of Santa Clara County.

The fact of discovery and denouncement is proved by the following documents and witnesses :—

I. The fact of possession and working is proved by Pico, *Trans.* 630 ; by Suñol, *Trans.* 25, 409 ; by Noriega, *Trans.* 22, 419 ; by José Fernandez, *Trans.* 604, etc.

The extent of the working is best proved by Mr. Wm. G. Chard, who was employed by Castillero to open the mine ; to dig the *pozo de posesion ;* to construct the first rude furnaces at the Hacienda. See his deposition generally, *Trans.* 1068.

II. Castillero's letters of the second and twenty-first of December, 1845—to General Vallejo—*communicate discovery and working.*—*Trans.* 2603.

III. Castillero's letter to Governor Pico, of the tenth of December, 1845, informs him:—"*The mine has been denounced by me, and between a few we have formed a Company,*" etc.; and asks for *vacant lands* to cut wood, etc.—*Trans.* 1805.

IV. Governor Pico's letter to the Minister of Relations—of the thirteenth of February, 1846—inclosing the foregoing original letter, and saying: "*You will be informed of the fortunate discovery made in this department of a quicksilver mine.*" * * * I avail myself, etc, *to send to your Excellency, etc., the quicksilver which, as a sample, was sent to me by Señor Castillero, and to which he refers in the above mentioned letter.*—*Trans.* 1805.

Copies of the foregoing letters are found in Exhibit Bassoco No. 9. —*Trans.* 1805.

The *borrador* of Governor Pico's letter was retained in the California archives, *Trans.* 2549. Proved by Pico, *Answer* 7, *Trans.* 2532; proved by Olvera to be in his own handwriting, *Answer* 5, *Trans.* 2610. Pico remembers that he received letters and quicksilver from Castillero, *Answer* 13, *Trans.* 2533. Hopkins' statement, 3068.

Governor Pico's letter, with its inclosed note from Castillero, was received by the Minister of Relations on the sixth of April, 1846, as by endorsement.—*Trans.* 1805; Castillo Lanzas' deposition, *Answer* 23, *Trans.* 2232; *Answer* 30, *Trans.* 2233.

V. On the sixth of April, 1846, the Minister of Relations answered Governor Pico's letter expressing the President's satisfaction on hearing of Castillero's discovery.—*Trans.* 1806. There is no proof that this letter was received.

VI. On the fifteenth of December, 1845, Castillero addressed another letter to Governor Pico, referring to his previous one of the tenth same month, *stating discovery of the mine.*—*Trans.* 2552. Proved by Pio Pico, *Answer* 13, *Trans.* 2533. See Hopkins' statement, 3068. This letter is in the California archives.

VII. On the thirty-first of December, 1845, Manuel Castro, Prefect of the second District, officially announced to Governor Pico that Castillero "*has denounced, and is now working, a quicksilver mine*," etc.—*Trans.* 2550. Proved by Pio Pico, *Answer* 9, *Trans.* 2532. In California archives. See Hopkins' statement, 3068.

VIII. The foregoing was answered on the twenty-second of January, 1846, as appears by marginal note. The blotter of answer is in the California archives.—*Trans.* 2551. Proved by Pio Pico, *Answer* 10, *Trans.* 2533; Hopkins, 3068.

IX. About the twenty-second of January, 1846, Captain John C. Fremont visited the mine, where he saw Castillero, the owner, who described to him the process of acquiring mines under the Mexican law, and said he had so acquired that one; Fremont wished to purchase it, with Leidesdorff and others.—Fremont's deposition, *Trans.* 2678.

X. On the third of April, 1846, Thomas O. Larkin, U. S. Consul at Monterey, in a letter addressed to the American Minister in Mexico, informs him of Castillero's discovery.—Ex. Swasey, No. 2, *Trans.* 2667–8.

XI. On the second of May, 1846, Mr. Larkin gives same information to Captain J. B. Montgomery, U. S. ship Porstmouth. —Ex. Swasey No. 4, *Trans.* 2660; and Ex. Swasey No. 9, *Trans.* 2676.

XII. On the fourth of May, 1846, Mr. Larkin addressed a long letter to the State Department, on the mineral resources of California, in which he mentioned Castillero's discovery of this mine, and described the process of extracting the metal, etc.—Ex. Swasey No. 5, *Trans.* 2669.

This letter is in the State Department; certified extracts from it are in evidence.—*Trans.* 2657.

XIII. Another letter from Larkin to Mr. Buchanan, dated the twenty-eighth of March, 1848, mentions *avio* of the mine in 1846. —Certified copy of extract from State Department, *Trans.* 2658.

XIV. On the twenty-fourth of June, 1846, Mr. Larkin addressed a letter to G. P. Judd, Esq., Minister of Finance, Honolulu, Sandwich Islands, *stating the discovery of this mine by a Mexican officer in* 1845, *its denouncement before nearest Alcalde*, etc.; and he also sent to Mr. Judd, we may infer, a copy of his letter to Mr. Buchanan, of the fourth of May, 1846, for they are both published in the *Polynesian*, at Honolulu, on Saturday, July 25th, 1846.—See *Trans.* 2223.

The number of the *Polynesian* containing this letter is in evidence. Proved by Milo Calkin, *Trans.* 2645; and by C. E. Hitchcock, printer of that paper.—*Trans.* 2647.

Mr. Judd's reply to Mr. Larkin, acknowledging receipt of foregoing letter and specimen of cinnabar.—*Trans.* 3020. Proved by F. H. Larkin, and C. E. Hitchcock.—*Trans.* 3018–3024.

XV. We were led to a knowledge of the contents of the *Polynesian* of the twenty-fifth of July, 1846, by seeing them noticed in the *Diario del Gobierno de la Republica Mexicana* of the twenty-seventh of December, 1846.—*Vide* Castillo Lanzas' deposition, *Answer* 692, *Trans.* 2355.

XVI. In the spring of 1848, General Mason, the Governor of California, visited the Almaden mine, and gave an account of the operations to Adjutant-General Jones in a letter of the seventeenth of August, 1848.—Cal. Message and Correspondence, 1850, Doc. No. 17, p. 534.

PROOF OF THE GENUINENESS AND CUSTODY OF THE ESPEDIENTE OF REGISTRY AND POSSESSION, NOW IN THE RECORDER'S OFFICE OF SANTA CLARA COUNTY.

I. Testimony of José Noriega, assisting witness to act of possession, taken nineteenth of March, 1855. — *Answers* 2–3; *Trans.* 22.

II. Of Antonio Suñol, the other assisting witness, taken on same day.—*Answers* 2–3; *Trans.* 25.

III. Of Antonio M. Pico, the Alcalde who gave possession, taken eleventh of November, 1857.—*Trans.* 630.

N. B.—Pico was first called in this case by the Government.—*Trans.* 169.

IV. Of Suñol and Noriega, on their recall by Government.—*Trans.* 409–419.

V. Of José Fernandez, claimant's witness, taken sixth of November, 1857.—*Trans.* 599.

Was *Sindico del Juzgado* and *Escribano* of the Court in 1845.—*Trans.* 600.

Was *Juez suplente* in 1846.—*Trans.* 600.

Proves signatures *espediente.*—*Trans.* 602.

Received the *espediente* in 1845, and deposited it in the archives.—*Answers* 19–20–21; *Trans.* 602–3.

Saw it again in 1849, when he was Second Alcalde.—*Answer* 28; *Trans.* 603.

VI. Of James Weekes, Government witness, who was called twice, twenty-fourth of June and fourteenth of August, 1857.—*Trans.* 165–305.

When first called, no questions asked about this *espediente.*—*Trans.* 165.

When next called, Government attempted to prove the non-

existence of the *espediente* in archives, but failed.—*Answer* 13; *Trans.* 307.

Witness saw *espediente* in 1846–7, when Burton was Alcalde.—*Answer* 15; *Trans.* 307.

And again in 1848, when he was himself Alcalde.—*Answer* 15; *Trans.* 307.

Identifies this *espendiente*.—*Answers* 17–35–42–43–44; *Trans.* 307–310.

VII. Manuel Castro, Prefect, on thirty-first of December, 1845, in a letter to Governor Pico *states denouncement*, and incloses petition for two leagues.—*Trans.* 2546.

This letter is in the California archives.

VIII. *Borrador*, or rough draft of answer to foregoing, in the California archives.—*Trans.* 2551.

IX. Inventory of papers and effects in the *Juzgado*, when Pico went out of office on the first of January, 1846; signed by Pico, and receipted by Chavolla, the incoming Alcalde, second of January, 1846. Mentions in list of documents, *Posesion de la Mina de Sta. Clara, á D. Andrés Castillero.*

Produced by Chapman Yeates, Clerk of the City of San José, from archives of that place, on the thirtieth of January, 1858.—*Trans.* 769.

Proved by McCutchen.—*Trans.* 767.

X. Castro's petition to Alcalde Pacheco, dated twenty-seventh of June, 1846. *Refers to espediente of denouncement in the archives, and prays to be included therein.* Offered by Government.—*Trans.* 622.

XI. Marginal decree of Pacheco on foregoing petition, *ordering the petition to be included in espediente, as prayed.* Offered by the Government.—*Trans.* 622.

XII. Certified copy of the whole *espediente*, Castro's petition included, signed by Chavolla on the thirteenth of August, 1846.

Proved by Salvio Pacheco, brother of Dolores Pacheco, the First Alcalde, to be in his own handwriting, and made at its date.—*Trans.* 664.

XIII. Record of suit between Grove C. Cook and the owners of the mine. Cook said they were working the mine on his land contrary to law, and prayed they might be removed. Measurement and survey ordered. Plaintiff put in for costs. Proceedings in March, 1847.—*Trans.* 815.

XIV. Existence of the *espediente* in archives in March, 1847, proved by Forbes' Consular letter to Burton, Alcalde, on the fourteenth of August, 1847, complaining of recent trespasses by Cook *within the limits of the juridical possession of the mine of Santa Clara*, and referring the Alcalde to "*the documents which exist in your office, upon which was founded your conviction of the justice of your decision in relation to the claim of Mr. Cook in March last, etc.*"

This letter was produced by Chapman Yeates, Clerk of the City of San José, from the archives of that place, on the thirtieth of January, 1858.—*Trans.* 769.

And is proved by McCutchen.—*Trans.* 767.

XV. Not two months after James A. Forbes had seen this *espediente* in Alcalde Burton's office, as proved by the foregoing letter, to wit, on the fifth of May, 1847, in a letter to Mr. Alexander Forbes, he speaks of the "*juridical possession which was given of the mine by the local authority of this jurisdiction*," and also of "*the three thousand varas of land given in that possession as a gratification to the discoverers.*" *Vide* Exhibit O. H. X. No. 11.—*Trans.* 842.

XVI. Alexander Forbes' petition to Alcalde Weekes, on the nineteenth of January, 1848, prays that the *former act of possession* may be amended. Offered by the Government.—*Trans.* 806.

XVII. Weekes' amended possession given the twenty-first of January, 1848, refers to the *original act of possession*, and declares

that "*the right and title of the mine to the land granted as a reward in the original act of possession shall remain valid.*" See *Trans.* 148 for the Spanish, and 802–805 for the translations, which are erroneous. Offered by the Government.

This is the same Mr. Weekes, the Government witness, who proves the original *espediente* to have been in the Alcalde's office in Burton's time, 1846–7, and in his own, in 1848.

XVIII. In the possessory action between Walkinshaw and Forbes. Complaint filed eighteenth of October, 1849; Walkinshaw claims "*one-eighth part of the mine by title derived under the original act of registry.*" Offered by the Government.—*Trans.* 272.

XIX. In Mr. Horace Hawes' denouncement of the mine on the sixth of October, 1849, for abandonment and insufficient registry, he describes the mine as situated on Berreyesa's Rancho, and as known *in its original title of registry as the mine of Santa Clara.*

He says its last possessors were Andrés Castillero, Alex. Forbes, James A. Forbes, Robert Walkinshaw, and the two Robles. Offered by Government.—*Trans.* 287.

Alcalde May's proclamation thereupon, twenty-third of October, 1849, describes the mine as *known and designated in its original act of registry as that of Santa Clara, and now known by the name of New Almaden.* Offered by Government.—*Trans.* 297.

The Alcalde refusing to entertain jurisdiction of the denouncement, Mr. Hawes filed his protest on the fifteenth of November, 1849, and said, that besides abandoning the mine, the former owners, *by reason of the insufficient registry thereof, etc.*, never acquired any title to the mine, which he stands ready here in Court, with *witnesses, records and documents*, offering to prove, etc. Offered by Government.—*Trans.* 299.

XX. On the eighteenth of January, 1851, Captain H. W. Halleck, accompanied by Josiah Belden, Mayor of San José, removed this *espediente* from the office of the latter to that of the

County Recorder of Santa Clara County, where it properly belonged, and at three o'clock, P. M. of that day, it was filed in the County Recorder's office, as appears by the indorsement of the Recorder. *Trans.* 257, 794. *Halleck's deposition, Trans.* 332.

PROOF OF THE GENUINENESS AND CUSTODY OF THE "COPIA AUTORIZADA" OF THE ESPEDIENTE OF REGISTRY AND POSSESSION.

The *copia autorizada* of the registry and possession, is Exhibit Young No. 1.—*Trans.* 2688.

McAllister, Edwards and Rose received it from Walkinshaw in December, 1852, or in January, 1853.—*Vide Hall McAllister's deposition, Trans.* 2698.

It remained in McAllister's office from that time until May, 1858, when he delivered it to Walkinshaw, with other papers, and took a receipt.—*McAllister's deposition, Trans.* 2698; *Reese's deposition, Trans.* 2712.

Walkinshaw, on receiving it from McAllister, handed it to John Young, his agent, and now his executor, by whom it was with the other papers enveloped and labeled, "*Papers relating to the disputed barra, between R. Walkinshaw,*" *etc.*

In July, 1860, the counsel of the New Almaden Company, having occasion to examine all the conveyances by Padre Real of his shares in the mine, caused search to be made among Walkinshaw's papers for such as might be there, which led to the discovery of the espediente in question.—*See Young's deposition, Trans.* 2684, *and Bell's deposition,* 2696.

The genuineness of the espediente is proved by the Alcaldes and all the assisting and subscribing witnesses, except José Suñol, whose death is proved.

See Pico's deposition, *Trans.* 2731; See Antonio Suñol's deposition, *Trans.* 2718; See José Noriega's deposition, *Trans.* 2803; See Pedro Chaboya's deposition, *Trans.* 2806; See Pedro Sansevain's deposition, *Trans.* 2809.

CONTENTS OF ESPEDIENTES FROM MEXICO, AND PROOF OF THEIR GENUINENESS AND CUSTODY.

No. 1.

Official communication, dated twenty-first April, 1846—Junta de Fomento to General Tornel, Director of National College of Mining —sending specimens for assay, with copies of Castillero's letters to Herrera and Moral.

Original in Exhibit Bassoco No. 10, *Trans.* 1809; *Office copy* in Exhibit Bassoco No. 7, *Trans.* 1783.

Original proved by Bassoco, *Ans.* 152, *Trans.* 1240; Balcarcel, *Ans.* 152, *Trans.* 1871; Castillo, *Ans.* 34, *Trans.* 1940.

Office copy by the same persons.

No. 2.

The minutes of the proceedings of the Junta Facultativa of the College, of the twenty-fourth April, 1846; dated by mistake the twenty-fourth March of that year; to be found in Exhibit Bassoco No. 11, *Trans.* 1813.

At this meeting were read some documents from the *Junta de Fomento*, which the Director had transmitted to the Faculty of the College, relative to Castillero's discovery of a deposit of cinnabar in California, and the Faculty resolved—"that a report be made in conformity with what has been done, that is to say: that some of said specimens had already been assayed by Señor Don Manuel Herrera, and others deposited in the Cabinet of Mineralogy; that the yield of specimens showed thirty-five and one-half per cent. of quicksilver, for they were so rich that they were composed of pure cinnabar; and finally that the excellent Señor Director be urged to interpose his influence with the Supreme Government and the *Junta de Fomento de Mineria*, to the end that Señor Castillero should be effectively rewarded for having made so important a discovery."

The members of the Faculty of the College in that year were Don Thomas Ramon del Moral, President, and Professors Balcarcel, Navarro, Camacho and Castillo, the last named being the Secretary.

These minutes are proved by Professor Castillo, Secretary of the

Faculty, *ans.* 29, 30, Trans. 1939; and by Professor Balcarcel, a member of the Faculty, *ans.* 40, 41, 42, 43, 44, Trans. 1872.

Personal recollection of Castillo, *Trans.* 1943, *Answer* 39; of Balcarcel, *Answer* 45, *Trans.* 1872.

No. 3.

Official communication, dated twenty-ninth April, 1846—General Tornel, Director of the College, to Don Tomas Ramon del Moral, President of the Junta Facultativa of same—acknowledging receipt of a letter from Señor Moral, of twenty-fourth April, 1846, communicating result of assay; found in Exhibit Bassoco No. 11, *Trans.* 1813.

Proved by same witnesses as foregoing, and in same answers.

No. 4.

Official communication, dated twenty-ninth April, 1846—from General Tornel, Director of College, to the Junta de Fomento—communicating result of assay; found in Exhibit Bassoco No. 7, *Trans.* 1785.

Proved by Bassoco, *Answers* 139–141, *Trans.* 1237–8; Balcarcel, *Answers* 40–42, *Trans.* 1870–71; Castillo, *Answer* 36, *Trans.* 1942; *Answer* 37, *Trans.* 1943; Miranda, *Answers* 10–11, *Trans.* 2147–8; Castillo Lanzas, *Answers* 17–18, *Trans.* 2230–1.

No. 5.

Official communication, dated fifth May, 1846—from Junta de Fomento to the Minister of Justice—making known to the President Castillero's discovery, etc.

Original in Exhibit Bassoco No. 8, *Trans.* 1794–5–6.

Office copy in Exhibit Bassoco No. 7, *Trans.* 1786–7.

Original proved by Bassoco, *Answers* 144–145, *Trans.* 1239; Yrisarri, *Answers* 13–14, *Trans.* 2110; Miranda, *Answers* 13–14, *Trans.* 2149–50–51.

No. 6.

Official communication in reply to foregoing, dated ninth May, 1846.

Original in Exhibit Bassoco No. 7, *Trans.* 1787.

Office copy in Exhibit Bassoco No. 8, *Trans.* 1797.

Original proved by Bassoco, *Answers* 138–139–141, *Trans.* 1237–8; Balcarcel, *Answers* 40–42, *Trans.* 1780–1; Castillo, *Answers* 36–37, *Trans.* 1941–2; Yrisarri, *Answers* 9–10, *Trans.* 2108–9; Miranda, *Answers* 10–11, *Trans.* 2147–8; Castillo Lanzas, *Answers* 17–18–19, *Trans.* 2230–1.

No. 7.

Contract proposed by Castillero to the Junta de Fomento, dated twelfth May, 1846.

Original in Exhibit Bassoco No. 8, *Trans.* 1800–1–2.

Office copy in Exhibit Bassoco No. 7, *Trans.* 1790–1–2.

Original proved by Couto, who copied it for Castillero from his rough draft; *Answers* 25–26–27–28, *Trans.* 1000.

No. 8.

Official communication, dated fourteenth May, 1846—from the Junta de Fomento to the Minister of Justice—inclosing the original of foregoing proposed contract, and urgently recommending the President of the Republic to agree to it.

Original found in Exhibit Bassoco No. 8, *Trans.* 1798–9–1800.

Office copy in Exhibit Bassoco No. 7, *Trans.* 1787–8–9.

Proved by Bassoco, *Answers* 144–145, *Trans.* 1239; Yrisarri, *Answers* 13–14, *Trans.* 2110; Miranda, *Answers* 13–14, *Trans.* 2149–50–51.

Marginal decree of grant on foregoing proved by Bassoco, *Answer* 145, *Trans.* 1239; Yrisarri, *Answer* 14, *Trans.* 2110; Miranda, *Answer* 14, *Trans.* 2151.

Record of foregoing marginal decree in the one hundred and fortieth leaf of the fifteenth vol. of the Libro General; found in Exhibit Bassoco No. 12, *Trans.* 1816.

Proved by Yrisarri, who made the record, *Answers* 24–25, *et seq.*, *Trans.* 2113–14–15, etc.

No. 9.

Official communication, dated twentieth May, 1846—from Minister of Justice to Junta de Fomento—ratifying and approving said contract in all its parts.

Original found in Exhibit Bassoco No. 7, *Trans.* 1792.

Office copy in Exhibit Bassoco No. 8, *Trans.* 1802.

Original proved by Bassoco, *Answers* 139–141, *Trans.* 1237; Miranda, *Answer* 11, *Trans.* 2149; Castillo Lanzas, *Answer* 18, *Trans.* 2231; Yrisarri, *Answer* 10, *Trans.* 2109.

No. 10.

Official communication, dated twentieth May, 1846—from Minister of Justice to Minister of Relations—communicating the President's approval of Castillero's contract with the Junta de Fomento; the grant of two square leagues to Castillero on his mining possession; and directing Minister of Relations to issue the proper orders.

Original found in Exhibit Bassoco No. 9, *Trans.* 1807.

Office copy in Exhibit Bassoco No. 8, *Trans.* 1803.

Proved by Bassoco, *Answers* 147–8, *Trans.* 1239–40; Yrisarri, *Answers* 20–21, *Trans.* 2111–12; Miranda, *Answers* 16–17, *Trans.* 2152–3.

The body of this letter is in Miranda's handwriting; Castillo Lanzas, *Answers* 22–23, *Trans.* 2232.

The marginal decree on the foregoing letter in these words—*May 23d*, 1846. *Issue the orders referred to in this communication*—is in the handwriting of Quintanar, and bears the rubric of Castillo Lanzas; proved by Castillo Lanzas, *Answer* 23, *Trans.* 2232; and by Bassoco, Yrisarri and Miranda, as last cited.

No. 11.

Official communication, or decree, dated twenty-third May, 1846—addressed by the Minister of Relations to the Governor of the Department of Californias—setting forth the President's approval of Castillero's proposed contract; the grant of two square leagues to Castillero on his mining possession; and ordering the Governor to put him in possession of said land.

This is the two-league grant. The original was delivered to Castillero, and by him filed in this claim, before the U. S. Land Commissioners.—*Trans.* 65.

An office copy was retained in the Ministry of Relations.—*Trans.* 1807.

Original proved by Lafragua, *Trans.* 17; by Velasco, who wrote

the grant, *Answer* 6, *Trans.* 2200; and by Castillo y Lanzas, the Minister who signed it, *Answers* 26–27–28, *Trans.* 2233.

Mr. Negrete proves that Castillero handed to him this identical paper in December, 1846, in order that it might be copied in his ratification of the McNamara contract; and after having been there copied, that he, Negrete, sent it to Mr. Alexander Forbes, of Tepic, on the nineteenth December, 1846.—Negrete's deposition, *Answers* 32–36, *Trans.* 2401–2; and Exhibit Negrete No. 9, *Trans.* 2448–91.

No. 12.

Lafragua's Report. On the fourteenth, fifteenth, and sixteenth December, 1846, Don José Maria Lafragua, Minister of Interior and Exterior Relations, read a report to the Mexican Congress.

His report refers to Castillero's discovery of a quicksilver mine in Upper California—p. 65 of Report, of which see Extract in Exhibit J. P. Benjamin No. 1, *Trans.* 3039.

In his report is also incorporated the report which the Junta de Fomento sent in to him, as Minister of Relations, on the seventeenth November, 1846.

The identical manuscript report which the Junta de Fomento thus sent in, is in evidence. It is Exhibit Bassoco No. 4, and begins in *Transcript* on page 1712.

This report of the Junta made very full reference to Castillero's discovery, and set forth what the Junta had done to assist the development of the mine. Extracts of the important parts of it will be found in Exhibit J. P. Benjamin No. 1, *Trans.* 3039–40.

Mr. Lafragua's and the Junta's Reports are proved:

By Lafragua, *Answers* 7–8, *Trans.* 17–18. The extracts filed by Mr. Lafragua will be found on pages 71, 72, 73 of *Transcript.*

By Mr. Bassoco, *Answers* 114 *et seq.*, *Trans.* 1232 *et seq.* He also proves the Original Manuscript Report, (Exhibit Bassoco No. 4) *Answers* 121 *et seq.*, *Trans.* 1233.

By Mr. Castillo y Lanzas, *Answers* 53–54 *et seq.*, *Trans.* 2237–8. The reading of this report is noticed in the *Diario del Gobierno de la Republica Mexicana* of nineteenth December, 1846, No. 135; of the twentieth December, 1846, No. 136; and of twenty-first December, 1846, No. 137; and also in *Monitor Republicana*

of the twenty-fourth, twenty-fifth, and twenty-eighth, same month and same year; and in the *Republicana* of the eighteenth, twentieth, and twenty-first of same month and year. *Vide* Castillo Lanzas' deposition, *Answers* 696–699, *Trans.* 2357–8.

By J. P. Benjamin, deposition *Trans.* 3026 *et seq.*

By the *Actas* of the Junta de Fomento of the fifth, ninth, and sixteenth November, 1846, and of the fifth December, 1846, *Trans.* 1702–3–4–5.

No. 13.

The ACTAS *of the Junta de Fomento*, being minutes of proceedings at their sessions.

Session of 6th May, 1846.

Noted: That Castillero appeared in person and made a verbal report "regarding the discovery, denouncement and actual condition of the Quicksilver Mine situated in the Mining District (Mineral) of Santa Clara, in Upper California, inviting the Junta to take shares in the Company which he has formed for working it, with other measures which he requests may be obtained from the Supreme Government for the furtherance of the enterprise. The Junta resolved that Sor. Castillero should present his indications in writing, that the Junta, taking them into consideration, may resolve what may be expedient."—*Trans.* 1684.

Session of 14th May, 1846.

Noted: The reception of several communications:

First. "From the Ministry of Justice, of date 9th, acknowledging receipt of the official letter in which was communicated to it the discovery of the mine of Quicksilver in the Californias.—*Trans.* 1688.

Noted: The reception of several letters from Don José Zamora:

"In the third, he represents, that of the one thousand two hundred and seventy-two quicksilver flasks existing in the negotiation, only a very few have flaws, and that they ought to be worth three dollars each, as they are valued at two reckoned as iron. Let this difference be represented to Señor Castillero, and to the Government when his propositions are approved."—*Trans.* 1690.

Session of 25th May, 1846.

Noted: A report of several communications:

"*Sixth.* An official letter from His Excellency the Minister of Justice, dated 20th, approving the propositions of Don Andres Castillero, which the Junta had transmitted to the Supreme Government; and informing that he had sent to the Ministry of Government the petition for two square leagues of land (*Sitio de ganado mayor*) as a colonist, upon his mining property. The Junta resolved, that the proper judicial agreement be drawn up immediately, and that application be made for the draft for the five thousand dollars on Mazatlan or Guadalajara; to which Señor Castillero agreed: and finally, that by the mail of Wednesday the proper orders be sent to Tasco, that the administrator deliver to the order of Señor Don Tomas Ramon del Moral all the quicksilver flasks in good condition in the storehouses there, at the rate of two dollars each." —*Trans.* 1694.

Session of 29th May, 1846.

Noted: The following resolution:

"It was also resolved, in conformity with the report of the Comptroller's Office, that twenty-five dollars be paid to the Notary Calapiz for proceedings in the instrument of agreement which had been made with Don Andres Castillero, to assist his quicksilver enterprise in the mine of Santa Clara, in Upper California, embraced in the official order for the suspension of all payments for this branch."—*Trans.* 1697.

As this resolution declares, the order of Government suspending all payments out of the quicksilver fund, embraced the case of Castillero, who was to have received five thousand dollars as a loan in aid of his mining enterprise. This order was issued in May, 1846, and so far as an advance of money by the *Junta de Fomento* was concerned, Castillero was disappointed.

Session of *9th November*, 1846.

Noted: "Beginning was made of the reading of the report to be presented to the Government, and the two chapters relating to the Office and to Mining Tribunals were approved; and it was resolved that an official letter be addressed to Señor Otero, inquiring of him the condition of his work upon mining legislation."—*Trans.* 1702.

Session of 19*th November*, 1846.

"The reading of the report, which was continued on the previous days, having been finished, the same was approved; and it was resolved to direct also to the Supreme Government an official communication requesting that the Ministry of Finance transmit the respective orders to the effect, that so soon as the blockade is raised, the Custom Houses of Vera Cruz and Tampico remit directly the corresponding drafts in favor of the Junta, giving authority to the Junta to negotiate a loan for the purpose of defraying the expenses of the College and the most urgent expenses of the branch of quicksilver; resolving, finally, that the President convey said communication to the Minister, that it may be promptly dispatched."—*Trans.* 1704.

The report above referred to was that which was made by the *Junta de Fomento* to Mr Lafragua, Minister of Relations, Government and Police, and by him referred to in his report to the General Congress in December, 1846, and appended to same.

Session of 5th December.

Report was made of the two following communications:

"From the Minister of Relations of yesterday: in the first, acknowledging receipt of the report sent to him for insertion in his report, and authorizing the Junta to procure, on the most favorable terms possible, the sum required to defray the expenses of the College, and the salaries assigned to the Quicksilver fund, with mortgage of this fund, in the understanding that the proper orders have been issued; that so soon as the blockade of Vera Cruz is raised, there shall be remitted directly to the Junta drafts for three per cent. of importation duties to the amount of eighty thousand dollars per annum; adding, also, that in the case said loan is not promptly obtained, the Junta furnish the amounts required from the Dotal fund to be repaid by the Quicksilver fund, out of which it shall be reimbursed as soon as any money is received from the Custom Houses, or the proposed loan is contracted."—*Trans.* 1705.

INDEX TO MEXICAN ARCHIVES.

Date.		Page.
1845.		
Dec. 10.	Letter: Castillero to Pio Pico, communicating denouncement of mine—transmitted to Minister of Relations	1805
1846.		
Feb. 13.	Pio Pico to Minister of Relations, inclosing the above	1805
April 6.	Answer of Minister of Relations to above	1806
" 5.	Extract from "*Diario Oficial*," announcing that Government had received news from Upper California	2354

1846.		
Feb. 19.	Castillero to Moral, announcing discovery	1784
April 13.	Herrera to Moral, inclosing extracts of Castillero's letters to him, announcing discovery	1784
April 21.	Junta de Fomento orders assay in Mining College.	1783
*April 24.	Session of Faculty of Mining College—assay reported	1813
April 29.	Tornel acknowledges to Moral receipt of this report	1813
April 29.	Tornel communicates to Junta the report received from the Faculty, and recommends aid to Castillero	1785
May 4.	*Acuerdo* of Junta, ordering these facts to be communicated to Executive	1785
May 5.	President of the Junta makes the communication through the Minister of Justice	1786
May 9.	Minister of Justice acknowledges receipt	1787
May 6.	Castillero makes a verbal report to Junta, and is required to make his statements in writing	1760

*This session is dated *March* 24th, by a clerical error, which is explained in the testimony at pp. 1872-3, 1941.

Date.		Page.
May 12.	Castillero makes written proposals, stating his denouncement, and possession, and grant of three thousand varas	1790
May 14.	Junta transmits proposals with urgent recommendations	1787
May 20.	*Acuerdo*, granting Castillero's demands	1798
May 20.	*Acuerdo* is recorded in the *Libro General*	1816
May 20.	Minister of Justice replies to Junta reporting that President approved of the arrangement *in all its parts*	1792
May 20.	Minister of Justice communicates the President's orders to Minister of Relations about two league grant	1803
May 23.	*Acuerdo* of Minister of Relations, directing order to issue	1807
May 23.	Minister of Relations sends order to Governor of California to put Castillero in possession	1807
	Indorsement on the espediente in Ministry of Relations, "Concession of two square leagues to Señor Castillero"	1808
June 12.	Castro's power to MacNamara to bargain with some English company to work the mine	2469
Nov. 28.	Contract of *avio* made under foregoing power	2471
Dec. 17.	Castillero produces the two-league grant in City of Mexico, and a copy is annexed to an authentic act of ratification of foregoing *avio*	2468
Dec. 19.	A copy is made by the Notary, who delivers it to Negrete	2474
Dec. 19.	It is sent by Negrete to Alexander Forbes	2449
Dec. 29.	Alexander Forbes receives the copy in Tepic	2452
1847.		
Feb. 3.	Castillero and Negrete present a petition asking for a second copy, and Judge Juan Hierra orders it	2466
Feb. 3.	Notary furnishes this additional copy	2486
Feb. 6.	Negrete forwards them to Alex. Forbes, and charges him seventy-five dollars for Notary's fees	2453

Date.		Page.
1846.	Blotter or *borrador* of the Sessions of the Junta de Fomento, in April, May, September, November, and December, 1846; produced in *traced copies*	1680
1846.	Book of Minutes or *Actas*, being the clean copy made from the above blotter, and forming part of the Archives; produced in *traced copies*...	1755
1846 and 1847.	Copy of the entire Volume Third of the Minutes of the Junta from the second of April, 1846, to the thirtieth of June, 1847; Original.... Translation...	1427
1846. Nov. 17.	Official Report made on the seventeenth of November, 1846, by the Junta de Fomento to the Ministry of Relations, in pursuance of its order, for the purpose of reporting it to the Congress of Mexico.....	1712
1841 to 1846.	Traced copy of two pages of the *Libro General*, Vol. 15, which is the record of all grants and decrees which passed through the Ministry of Justice in the years 1841–2–3–4–5 and 6....	1816
1845.	Official Report made by the Junta de Fomento to the Government in the year 1845.....	1819
1846.	Report to the Congress of the Nation, read by José Maria Lafragua, Minister of Relations, at the Sessions of Congress, on the fourteenth, fifteenth and sixteenth of December, 1846; Extracts at page..... [The whole volume produced in original.]	1211
1844.	Resumé of searches made for quicksilver mines in the year 1844 under orders of the Junta de Fomento, by Antonio del Castillo, Professor of Mineralogy.....	2051

Date.		Page.
1845–6–8.	Lecture of Antonio del Castillo, Professor, to the Class of Mineralogy, delivered on the seventeenth of November, 1845, with notes from his annual lecture delivered in 1846, published in the *Anuario* of the Mexican National College of Mining for the year 1848.....	2100
1846.	Extracts from the "Diario Oficial," "El Republicano," and "El Monitor Republicano," stating the reading of Lafragua's Report to the National Congress on the fourteenth, fifteenth and sixteenth of December, 1846.....	2357

INDEX OF WITNESSES WHO PROVE MEXICAN ARCHIVES.

Names.	Official Quality.	Page.
1. Manuel Couto,	Secretary of Administration of Fondo de Mineria.....	995
2. John P. Brodie,	Agent employed by Claimants.....	1059
3. John Forsyth,	United States Minister in Mexico.....	1111
4. José Maria Bassoco,	Member of Junta, Agent of its Creditors.....	1214
5. Blas Balcarcel,	Director of Mining College, Member of Faculty.....	1865
6. Antonio del Castillo,	Professor of Mineralogy.....	1935
7. José Maria Yrisarri,	5th *oficial* in Ministry of Justice..	2107
8. Mariano Miranda,	formerly clerk in do ..	2146
9. Augustin Jimenes de Velasco,	3d *oficial*, Ministry of Relations.....	2199
10. Castillo Lanzas,	Minister of Relations (Foreign).....	2229
11. José Maria Lafragua,	do do	15
12. Francisco Villalon,	Notary Public.....	2553
13. Francisco Martinez Negrete,	merchant.....	2395
14. Teodoro Soto Mayor,	2d Escribiente in Ministry of Justice	
15. Mariano Rodriguez,	*oficial* in Ministry of Justice.....	
16. Vicente Segura,	President of Junta de Fomento.....	

Names.	Official Quality.	Page.
17. José Maria Duran,	1st *oficial*, Ministry of Justice.....	
18. Juan Maria Flores,	Member of Junta de Fomento....	
19. J. P. Benjamin,	one of Claimants' Counsel	3026

INDEX OF PERSONS ENGAGED IN THE BUSINESS, WHO HAVE DIED, AND PAGES WHERE DEATH IS PROVEN.

Ramon del Moral,	died in 1847—see pp.	1231, 1864, 1944, 1992
Romanos,	" in 1847.....	2111, 1152
Rios,	" on third of May, 1848.	2149
Becerra,	" on 17th of December, 1852.....	2108
José Suñol,	" " " 1855.....	2719
José Berreyesa,	" June, 1846.....	2728

INDEX TO CALIFORNIA GENERAL ARCHIVES.

Date.		Page.
1845.		
Dec. 15.	Castillero to Governor Pio Pico; refers to other letter (p. 1805), relates discovery of quicksilver, asks possession of Island of Santa Cruz	2552
Dec. 31.	Manuel Castro, Prefect, to Governor Pico; states the *denouncement*, incloses petition for two leagues.....	2546
1846.		
January.	Answer to above, (rough draft or *borrador*) also giving order to put him in possession of Island	2551
Feb. 13.	Pio Pico to Minister of Relations in Mexico, being the *borrador* of the letter at p. 1615.....	2549

CALIFORNIA LOCAL ARCHIVES.

1846.		
Jan. 2.	Inventory of Juzgado of San José, including "Posecion de la Mina de Santa Clara á Dⁿ. Andres Castillero.".....	807
1847.		
March 17.	Suit of Cook v. Castillero *et al.*, for trespass on his land; *experts appointed to survey the mine.*	815

Date. Page.

Aug. 14. Letter from British Vice Consul to Alcalde Burton, complaining of trespass on the juridical possession of the mine, and referring Alcalde to the *documents which exist in his office*..... 810

ARCHIVES AT WASHINGTON.

1846.

May 4. Letter of Consul Larkin to James Buchanan, Secretary of State — details discovery, and working of the mine; extract..... 2657
(See entire letter at page 2669.)

1848.

March 28. Letter of Consul Larkin to James Buchanan, Secretary of State—announces *avio* of 1846, working and produce of mine, etc.; extract... 2658
(Entire letter at page 2673.)

Aug. 17. Report of Col. Mason, Governor of California, to Adjutant Gen. Jones—Ex. Doc. 17, 1st Sess. of 31st Congress, page 534. (Not copied in Record.)

ARCHIVES OF U. S. CONSULATE AT MONTEREY.

1846.

Feb. 12. Consul notes in his memorandum-book arrival of "Hannah" from Mazatlan..... 3018

March 7. Consul notes "Hannah" for Mazatlan..... 3018

March 8. Consul advises Colonel Fremont about brig "Hannah"..... 2667

April 1. Mott, Talbot & Co., write Consul, announcing arrival of "Hannah" in Mazatlan..... 3020

Apri 3. Consul writes to United States Minister in Mexico; announces departure of Castillero on D^{n}. Quijote, and his discovery of the quicksilver..... 2667

April 23. Consul writes to A. H. Gillespie that "Hannah" carried news to Commodore Sloat of Fremont's situation; that Castillero is expected back on D^{n}. Quijote by 1st July..... 2674

Date.		Page.
May 2.	Consul writes to Captain Montgomery, of U. S. ship "Portsmouth," details discovery and working of the mine which he has twice seen.....	2676
May 4.	Consul writes to James Buchanan, Secretary of State; gives same details as preceding.....	2669
June 24.	Consul writes to G. P. Judd, Minister of Finance, Honolulu; announces discovery, *denouncement before nearest Alcalde*, and the working of the mine by a Mexican who is the *owner*, and a priest	2224
July 2.	Consul writes to ; states same facts as above	2670
July 20.	Letter from G. P. Judd, acknowledging receipt of Consul's letter of 24th June, announcing that he had had it published in "Polynesian".	3020
1848.		
March 25.	Consul writes to James Buchanan, Secretary of State; announces *avio* of 1846; working 200 lbs. per diem; shipment of $20,000 of quicksilver; recalls his having sent specimens of the ore to Buchanan, Benton, *et al.*, in January, 1846.....	2673

"DIARIO OFICIAL," AND OTHER MEXICAN NEWSPAPERS.

1846.		
March 2.	Brig Juanita arrives in Mazatlan, in twelve days from San Diego.....	2354
March 12.	Brig Juanita leaves Mazatlan for San Blas, with *Covarrubias, passenger*	2354
April 1.	Brig Hannah arrives in Mazatlan, in five days from San Blas.....	2353
April 5.	Government receives news from Upper California.	2354
Dec. 19.	Report of Session of Congress of the 14th Dec.; Lafragua commences reading his Report.....	2357
Dec. 20.	Session of 15th Dec. Lafragua continues.....	2358

Date.		Page.
Aug. 14.	Letter from British Vice Consul to Alcalde Burton, complaining of trespass on the juridical possession of the mine, and referring Alcalde to the *documents which exist in his office*.....	810

ARCHIVES AT WASHINGTON.

1846.		
May 4.	Letter of Consul Larkin to James Buchanan, Secretary of State — details discovery, and working of the mine; extract..... (See entire letter at page 2669.)	2657
1848.		
March 28.	Letter of Consul Larkin to James Buchanan, Secretary of State—announces *avio* of 1846, working and produce of mine, etc.; extract... (Entire letter at page 2673.)	2658
Aug. 17.	Report of Col. Mason, Governor of California, to Adjutant Gen. Jones—Ex. Doc. 17, 1st Sess. of 31st Congress, page 534. (Not copied in Record.)	

ARCHIVES OF U. S. CONSULATE AT MONTEREY.

1846.		
Feb. 12.	Consul notes in his memorandum-book arrival of "Hannah" from Mazatlan.....	3018
March 7.	Consul notes "Hannah" for Mazatlan.....	3018
March 8.	Consul advises Colonel Fremont about brig "Hannah".....	2667
April 1.	Mott, Talbot & Co., write Consul, announcing arrival of "Hannah" in Mazatlan.....	3020
Apri 3.	Consul writes to United States Minister in Mexico; announces departure of Castillero on Dⁿ. Quijote, and his discovery of the quicksilver.....	2667
April 23.	Consul writes to A. H. Gillespie that "Hannah" carried news to Commodore Sloat of Fremont's situation; that Castillero is expected back on Dⁿ. Quijote by 1st July..... ..	2674

Date.		Page.
May 2.	Consul writes to Captain Montgomery, of U. S. ship "Portsmouth," details discovery and working of the mine which he has twice seen.....	2676
May 4.	Consul writes to James Buchanan, Secretary of State; gives same details as preceding.....	2669
June 24.	Consul writes to G. P. Judd, Minister of Finance, Honolulu; announces discovery, *denouncement before nearest Alcalde*, and the working of the mine by a Mexican who is the *owner*, and a priest	2224
July 2.	Consul writes to ; states same facts as above	2670
July 20.	Letter from G. P. Judd, acknowledging receipt of Consul's letter of 24th June, announcing that he had had it published in "Polynesian".	3020
1848.		
March 25.	Consul writes to James Buchanan, Secretary of State; announces *avio* of 1846; working 200 lbs. per diem; shipment of $20,000 of quicksilver; recalls his having sent specimens of the ore to Buchanan, Benton, *et al.*, in January, 1846.....	2673

"DIARIO OFICIAL," AND OTHER MEXICAN NEWSPAPERS.

1846.		
March 2.	Brig Juanita arrives in Mazatlan, in twelve days from San Diego.....	2354
March 12.	Brig Juanita leaves Mazatlan for San Blas, with *Covarrubias, passenger*	2354
April 1.	Brig Hannah arrives in Mazatlan, in five days from San Blas.....	2353
April 5.	Government receives news from Upper California.	2354
Dec. 19.	Report of Session of Congress of the 14th Dec.; Lafragua commences reading his Report.....	2357
Dec. 20.	Session of 15th Dec. Lafragua continues.....	2358

Date.		Page.
Dec. 21.	Session of 16th Dec. Lafragua concludes.....	2358
	Same extracts as above found also in two other papers, "El Republicano," "El Monitor Republicano."	

WITNESSES WHO PROVE CALIFORNIA ARCHIVES.

	Names.	By whom offered.	Date.	Page.
1.	José Noriega.....	Claimants.	1855, March 19.	23–2803
2.	Antonio Suñol.....	"	"	25–2718
3.	Frank Lewis.....	"	"	27
4.	S. O. Houghton....	"	1857, Oct. 23.	321
5.	H. W. Halleck....	"	" " 26.	332
6.	José Fernandez....	"	" Nov. 6.	599
7.	A. M. Pico.....	"	" " 11.	628–2731
8.	Salvio Pacheco....	"	" " 19.	664
9.	Jno. M. Murphy...	"	" Dec. 23.	743–752
10.	Raphael Sanchez...	"	1858, Jan. 30.	765
11.	Wm. M'Cutcheon..	"	" " 30.	766
12.	Chapman Yates....	"	" " 30.	769
13.	Wm. G. Chard....	"	" Dec. 15.	1069
14.	Peter Davidson....	"	1859, Jan. 22.	1084
15.	Pio Pico.....	"	" Oct. 19.	2351
16.	J. M. Covarrubias.	"	" Nov. 23.	2606
17.	Augustin Olvera...	"	" " 30.	2609
18.	José Castro.....	"	" " 28.	2612
19.	Jno. Bidwell.....	"	" Dec. 31.	2642
20.	Jno. C. Fremont...	"	1860, June 26.	2678
21.	Jno. Young.....	"	" July 17.	2684
22.	Thos. Bell.....	"	" " 17.	2696
23.	Hall McAllister....	"	" " 17.	2698
24.	Wm. S. Reese,....	"	" " 20.	2715
25.	Pedro Chaboya....	"	" " 27.	2806
26.	Pedro Sainsevain ..	"	" Aug. 7.	2809
27.	Geo. M. Yöell...	United States,	1857, June 24.	144–252
28.	J. W. Weekes.....	"	" " 24.	165–305
29.	A. M. Pico.....	"	" " 24.	169
30.	H. C. Malone.....	"	" " 24.	260

	Names.	By whom offered.	Date.	Page.
31.	Walkinshaw's petition	U. S.	1849, Oct. 18.	272
32.	H. Hawes' denouncem't	"	" " 6.	287
33.	Judge May's proclam'n	"	" " 23.	297
34.	Horace Hawes' protest	"	" Nov. 15.	299
35.	Frank Lewis.....	"	1857, Aug. 15.	316
36.	Antonio Suñol.....	"	" Dec. 12.	409
37.	José Noriega.....	"	" " 12.	418
38.	R. C. Hopkins.....Claimant.			

ESPEDIENTE OF THE MINE.

1845.

Dec. Original Registry in Alcalde's office.....257–794

1846.

Jan. 13. Original Testimonio found in Walkinshaw's papers 2688

Aug. 13. Chaboya copy; containing Castro's petition of the twenty-ninth of June, 1846..... 622

1848.

Jan. 20. Weekes' copy; being copy of original testimonio.....312–797

Jan. 19. Alex. Forbes' petition to Weekes for additional pertenencias, etc.....168–806

Jan. 21. Weekes' grant of four additional pertenencias, etc.....147–805

CONTENTS OF ESPEDIENTE.

1845.

Nov. 2. Partnership contract between Castillero, Robles, Padré Real and José Castro.....314–799

Nov. 22. Castillero denounces and registers his discovery.312–795

Dec. 3. Castillero's amended denouncement.....312–795

Dec. 30. Possession given of mine, and grant of 3000 varas.....313–796

1846.

June 29. Castro's petition to Alcalde..... 622

Date. Page.
1848.
Jan. 19. Alex. Forbes' petition for additional pertenencias and "*mejora de estacas*".....168–806
Jan. 21. Weekes grants this petition.....286–802

LAW POINTS.

I. The Jurisdiction of the Court under the Act of third March, 1851, over a Claim to a Mine acquired from the Mexican Government in California.

The serious opposition which our mining claim encountered before the Board of Land Commissioners, on the ground of its not being within the jurisdiction of the Board, and the dissenting opinion of Mr. Commissioner Thompson, in which the question of jurisdiction was discussed at great length, and the objection urged with much confidence, has induced me to devote more labor to the removal of the difficulties suggested on the argument of this question than, in my opinion, their importance merits.

Act third March, 1851, *to Ascertain and Settle Private Land Claims in California.*

This law is a remedial one, and should be liberally construed. Its object was not merely to separate the lands of private ownership from those which belong to the public, and to fix the demarcations of each, but much larger. It was intended both to ascertain and *settle* the private land claims in California; to respect equities where they should be proven, as well as to recognize full titles where they existed. It was intended to avoid all the injustice and inconvenience which might result to owners by the transfer of themselves and their property from one system of laws to another

very different from the first, and wholly inadequate to afford remedies for a violation of the rights in which such property consisted. And this it designed to accomplish by investing such property with the new attribute of a title from the United States.

Such was the great object of the law, and in addition to the very liberal construction which belongs of right to it as a remedial statute, Courts should, if possible, make it adequate to the support of the honor and good faith of the Government; for it is by this statute alone that Congress undertakes to fulfill its promise to Mexico to protect private property in California. In the opinion of its framers, the law was considered ample for that purpose; and they accordingly provided that all lands, the claims to which were not presented to the Commissioners within a limited time, should be deemed the public lands of the United States, and disposed of as such.

The statute, it is very clear, embraces *any right* or *title* to land in California derived from the Spanish or Mexican Governments; whether the estate be absolute or conditional, fee simple, fee determinable, for life, for years, or of any other description known to the law. For such are its words: "*Any right or title* to land in California."

The jurisdiction of the Court, therefore, depends upon the nature of a mine, as a subject of property. Is a mine *land*, in the meaning of the statute?

The Question Stated.

The words of the law are these: "That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, shall present the same to the said Commissioners when sitting as a Board," etc.

The thing claimed must be land in California; the right or title to it must have been derived from the Spanish or Mexican Government: such a right or title to such a thing is the subject over which the Board and the Courts are invested with jurisdiction by this law. Our mine is in California; our right or title to it is derived from the Mexican Government; and as we shall conclusively prove, a mine, regarded as a subject of property is, by the Spanish and Mexican law, and by the common law of England, land.

Propositions respecting the quality and quantity of a mine-owner's estate, and the class of things to which a mine regarded as the subject of property, belongs, under the Spanish law.

In the discussion of this question, it will be necessary to examine the laws of Spain and Mexico, to ascertain—1st, the character of a mine regarded as a subject of property; and 2d, the nature of the estate of the Crown or of the Republic in mines, and what estate or interest in them was granted to the subject or citizen.

These two questions are so intimately connected, that I shall treat of them together. I lay down the following propositions as the conclusions to which I have arrived, and which I propose to establish, as decisive of the question of jurisdiction.

First.—That the concession of a mine conveyed to the grantee full property in the very substance of the mine. The words used in describing this right of property are, *propiedad*, *propiedad y posesion*, *propiedad y usufructo*, *propiedad y utilidad*, *plena propiedad*, *dominio*, *pleno dominio*, *dominio absoluto y perpetuo*, *dominio directo y útil*.

Second.—That a mine considered as a subject of property belongs to the class variously denominated in Spanish law, *bienes raices*, *fundos*, *heredades*, *tierras*, *posesiones*, *predios*, *fincas*, which are equivalent to the common law term land.

Third.—That the quantity, or possible duration of the mine-owner's estate under such concession, was unlimited by any assigned point of time; that it was an estate of inheritance, and might endure in him and his heirs forever.

Fourth.—That the quality of his estate was limited or conditional, using these terms in their common law meaning.

Fifth.—That if the terms by which the duration of the mine-owner's estate was defined are the equivalent of a limitation, his estate would correspond most nearly to what is known at the common law as a *fee determinable;* and if such terms are the equivalent of a condition, his estate would correspond most nearly to Mr. Preston's definition of a *fee conditional* at common law; but it is not in all respects identical with either.

Modifications of the rights of Property in Land under the Civil Law and Common Law of England.

As a preliminary to this discussion, I shall not hesitate, even at the risk of appearing to devote too much attention to elementary learning, briefly to recur to some of the various modifications of estates in land under the civil law and the common law of England, and to quote from the text writers on that subject. Such an inquiry is never fruitless. In this case, involving questions to which the investigations of our Courts are not often directed, it is very useful.

Mr. Preston, in the preface to the second edition of his essay on the Quantity of Estates, says: "Every branch of the law on Rights and Titles, on Remedies, on the power of alienation, and the modes of conveyance, etc., etc., and the forms of action concerning the Title, or the Right to the Possession, and frequently to relief in Equity, must be deduced from the previous consideration what estate was in the person in reference to whom the inquiry is to be predicated; and my only regret is, that the work is not more complete than it will be found, notwithstanding the inconceivable labor which has been employed on it."—*Prest. on Est.*

In the ninth and tenth centuries there were only two tenures or modes of holding lands upon the continent, which were Allodial and Feudal. *Allodial* Lands were those whereof the owner had *dominium directum et verum;* the complete and absolute property, free from all service to any particular lord. *Allodium est proprietas quæ á nullo recognositur. Qui tenet in allodium id est in plenam et absolutam proprietam, habet integrum et directum dominium, quale á principio fuit distributum et distinctum.* So that the owner of an *Allodium* could dispose of it at his pleasure; or transmit it as an inheritance to his children."

"A *feud* was a tract of land acquired by the voluntary and gratuitous donation of a superior; and held on condition of fidelity and certain services, which were in general of a military nature."—1 *Gr. Cruise*, 6.

A *feud* is thus defined by Craig: "*Est feudum beneficium, seu benevola et libera rei immobilis, aut æquipollentis, concessio, cum utilis dominii translatione; retenta proprietate, et exhibitione servitiorum honestorum.*"

"It was *benevola et libera* concessio; being supposed to have been originally granted from motives of mere benevolence, and not for any sum of money or other valuable consideration.

"*Dominii utilis.* The civilians distinguish between the *proprietas* and the *dominium utile.* The *proprietas* is the absolute property; the *dominium utile* is only the right of using the thing for a certain time.

"*Sub fidelitate.* This was the bond of connection between the lord and his vassal; and the most essential circumstance in the contract, as will be shown hereafter.

"*Servitiorum.* Services were also essential to a feud. They were generally of a military nature; but still feuds were not unfrequently granted in consideration of other services.

"A modern French writer observes that it will appear from an attentive consideration of the origin and progress of feuds, to have been the intention of the person creating the feud, to secure a constant acknowledgment of the grant so long as it subsisted; in which it differed from all other grants; and therefore that the gift of a feud ought to be defined:—

"*Une concession faite à la charge d'une reconnaissance toujours subsistante, qui doit se manifester de la manière convenue.*"—1 *Gr. Cruise*, 11, 12.

"The services which the vassal was bound to perform were declared by the lord at the time of the investiture, in the presence of the other vassals. But as a verbal declaration of the terms on which a feud was to be held might be forgotten or mistaken, it became usual for the tenant to procure a writing from the lord, containing the terms upon which the donation was made, witnessed by the other vassals, which was called a *breve testatum.*"—1 *Gr. Cruise*, 13.

"I shall now proceed to enquire into the nature of the estate or interest which each of them—(the lord and the vassal) had in the land. With respect to the *estate of the vassal*, we must recollect that as the original donations made by the French Kings to their *fidèles* and *leudes* were of a temporary nature, and as nothing more than the usufruct was given to them, so in the Feudal Law, the *proprietas* was allowed to remain in the lord, and the vassal had only the *ususfructus* or *dominium utile;* that is, a right to take and

enjoy the profits of the land, as long as he performed the services due to the lord.

"As to the duration of feuds, they were originally precarious, and might be resumed at the lord's pleasure. They were next granted for one year, afterwards for life. In the course of time it became unusual to reject the heir of the last tenant, if he was able to perform the services; and at length feuds became hereditary, and descended to the posterity of the vassal."—1 *Gr. Cruise*, 15, 16.

"With respect to the *estate* or interest which the lord had in the lands, after he had granted them out as a feud, it consisted in the *proprietas*, together with a feudal *dominium* or seignory, and a right to fealty, and all the other services reserved upon the grant. And in case of failure of any of these, the lord might enter upon and take possession of the feud."—*Ib.* 17.

"Feuds having been at all times considered as voluntary donations, it was very easy soon to establish that every act of the vassal which was contrary to the connection which subsisted between him and his lord, and to the fidelity he owed him, or by which he disabled himself from performing his services, should operate as a *forfeiture* of *the feud*.

"If the vassal omitted to require an investiture from the heir of his lord, for a year and a day after the death of the lord, and to take the oath of fealty to him, he lost his feud. So in the case of the vassal's death, if his heir did not require investiture from the lord within that time, *he forfeited* his feud.

"If the vassal refused to perform such services as were reserved upon the investiture, he forfeited his feud. *Non est alia causa beneficii auferendi quam si id, proter quod beneficium datum fuerit, hoc servitium facere recusaverit; quia beneficium amittit.*

"If the vassal aliened the feud, or did any act by which its value was considerably diminished, he forfeited it. *Si vasallus feudum dissiparet aut insigni detrimento deterius faceret privabitur.*

"If the vassal denied that he held his feud of the lord, by saying that he held it of some other person, or denied that the land was held by a feudal tenure, he forfeited it.

"Every species of felony operated as a forfeiture of the feud, being the highest breach of the vassal's oath of fealty."—*Ib.* 21.

"Every freeman who held his lands of the lord was bound, under

pain of forfeiting his feud, to attend his Court, there to assist his lord in determining all disputes between his vassals."—*Ib.* 22.

"Mr. Cruise, in his work on Real Property, B. I, Ch. II, § 2, says: 'The thing holden was therefore called a tenement, the possessors thereof tenants, and the manner of their possession, a tenure.'" And Lord Coke says: "In the law of England we have not properly *allodium*, that is any subject's land that is not holden."

In his note on this paragraph, Mr. Greenleaf remarks: "This great feudal principle that all lands are holden of the Sovereign, being thus acknowledged, the remark of Lord Coke quoted in the text seems in strictness to apply as justly to the United States as to England, we having no lands which are properly allodial, that is, which are not holden."

"It may be proper to observe there is a wide difference between the *quantity* and *quality* of an estate.

"By the *quantity*, must be understood the *extent* or continuance of time, or degree of interest in the estate; as for years, for life, in tail, or in fee. By the *quality* of an estate, the nature, incidents, and other collateral qualifications of that interest; as a condition, a collateral limitation, a joint tenancy, and the like are understood to be."—1 *Prest. on Est.* 6.

"By the *estate* of any one is to be understood his situation, and the circumstances of his tenancy, in regard to the *property* in which he has the interest in question."—*Ib.* 18, 19.

The time for which the right of enjoyment is to continue, forms the *quantity of the estate;* and in the manner in which the right to that enjoyment is to be exercised, as absolutely, solely, in common, in coparcenary, or in joint tenancy, consists the *quality of the estate.*

In regard to the certainty of continuance, Mr. Preston divides estates into—1st, Estates Absolute; 2d, Estates Determinable; 3d, Estates Conditional.

"The quantity of time comprised in any estate arises from the limitation. The quality of that estate arises from a condition, or from a proviso, partaking partly of the nature of a limitation, and partly of the nature of a condition."—*Ib.* 22, 24.

A FEE is an estate which *may* continue forever.

"The word *fee* is explained to signify, that the land, or other subject of property, belongs to its owner, and is transmissible in

case of an *individual* to those whom the law appoints to succeed him under the appellation of heirs, and in case of corporate bodies, to those who are denominated *successors*."

"Estates in fee are of several sorts, and have different denominations, according to their several natures and respective qualities. They may with propriety be divided into—

"1. Fees—simple,
"2. Fees—determinable,
"3. Fees—qualified,
"4. Fees—conditional,
"5. Fees—tail."

"A fee simple is an interest which, in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except the laws of escheat, or the canons of descent, by which it may be qualified, abridged, or defeated."—*Ib.* 419.

"The material difference between fee-simple and other fees is, that the former estate *will*, the latter estate *may*, continue forever."—*Ib.* 417.

"*Qualified and determinable fees* have, by many authors, been confounded, in terms, with fees-simple." "In propriety of language, the word fee expresses the *genus* of estates of inheritance: and the epithets added to this term describe the several species of this estate."

"A *determinable fee* is also an interest which *may* continue *forever*. It is a quality of this estate, while it falls under this denomination, that it is liable to be determined by some act or event, expressed on its limitation, to circumscribe its continuance, or inferred by the law as bounding its extent.

"Limitations to a man and his heirs:
"1. Peers of the realm;
"2. Kings of Scotland;
"3. Lords of the manor of D;
"4. Tenants of the manor of Dale;
"5. During the time while a particular tree, a tree in any wood, or any tree in a certain wood, etc., shall stand;
"6. Whilst a man or woman (not being the donee) shall have heirs of his body, or issue of his body;

"7. Till the marriage of a person shall take place.
"8. Till a person at *Rome* shall return from *Rome*, or till a person shall go to Rome;
"9. Till debts shall be paid;
"10. Till default shall be made in the payment of his debts;
"11. As long as A (add, and his heirs) shall pay £30 annually to B;
"12. So long as St. Paul's shall stand;
"13. Until a sum (that is, a sum certain) shall by paid by a particular person;
"14. Until an act shall be done;
"15. Until a minor shall attain his age of twenty-one years.
"16. Until legacies shall be paid;
"17. Until they shall have made a lease;
"18. Until he should otherwise dispose of the same;

"Are instances of this species of estate; and these are examples of fees determinable by express limitations."—1 *Prest. on Est.* 431.

"An estate with a determinable quality, by construction of law, properly falls under the denomination of a determinable fee, although no qualification be expressed, to ascertain the time of continuance." —*Ib.* 432.

"Suppose the owner of a determinable fee to convey that estate to a man and his heirs generally, and without any restriction; the construction of law on this conveyance would be, that the determinable quantity annexed to the estate, while in the tenancy of the person by whom it is conveyed, shall follow the same into the hands of the person to whom the transfer is made. The appropriate maxim is, '*nemo potest plus juris in alium transferre, quam ipse habet.*'" —*Ib.* 435.

"A fee determinable in its condition, may, eventually, (and without any act of the party, by taking a further assurance) become simple and absolute. Suppose a limitation be made to a man and *his heirs*—1st, *till the marriage of B;* and 2d, *till the return of C from Rome;* and the death of *B* to happen before his marriage, or the death of *C* to take place before his return from Rome; by these circumstances it becomes impossible that the event, expressed for the determination of the estate, shall ever arise; and the estate will for that reason continue to all eternity precisely in the same

manner as if the parties had not annexed to the disposition any collateral limitation, giving to the estate a determinable quality." —*Ib.* 439.

And in case of a mine held on conditions in law which made it determinable—a change in the laws removing these conditions would leave the estate in the mine a fee-simple.

Again, speaking of fees determinable, the author says, "the grantee has an estate which may continue forever; though there is a contingency which, when it happens, will determine the estate. This contingency cannot, with propriety, be called a *condition;* it is part of the limitation, and the estate may be termed a fee. Plowden uses the phrase, fee-simple determinable."—*Ib.* 441.

"Admit it to be possible that the interest *may* continue forever, and it will follow, that the interest is a fee to all intents; and it will be deemed an inheritance, or estate which may be enjoyed in continual succession."—*Ib.* 480.

"A limitation to a man and his heirs, *so long as* ANOTHER *person may have heirs of his body*, conveys a fee. The estate created by this limitation may determine by the death of the person, and failure of his issue; and yet he is not tenant for life only. B may have heirs of his body; and it is possible that, by succession from generation to generation, there may not be a failure of those heirs within any period of time. For this reason, a limitation in these terms passes an estate in fee, determinable by the failure of issue." —*Ib.* 482.

"A *qualified fee* is an interest given on its first limitation to a man and certain of his heirs, and not extending to all of them generally, nor confined to the issue of his body. A limitation to a man and *his heirs on the part of his father*, affords an example of this species of estate."—*Ib.* 447.

"Every qualified fee is also a determinable one."—*Ib.* 465.

It is determinable, "because it is liable to determine, as a consequence necessarily arising from the nature and form of the gift. It has another quality restraining it to certain heirs in the course of its devolution and descent, and the denomination descriptive of this quality is more properly used in giving denomination to the estate."—*Ib.* 467.

"A *conditional fee*, in the more general acceptation of the term,

is when, to the limitation of an estate, a condition is annexed which renders the estate liable to be defeated. In this application of the term, either a determinable or qualified fee may, at the same time, be a conditional fee."—*Ib.* 474.

"The time of limitation, or continuance, of an estate, is marked by a variety of means; sometimes by naming the description of persons by whom the estate is to be enjoyed, as heirs, heirs of the body; at other times, by fixing on a certain definite period, as a term of years; and lastly, by referring to some event which, though uncertain as to the time at which it will happen, must happen or become impossible; in some cases within the period of a life, as on the return of C from Rome; in others, within an indefinite period, as till failure of heirs of the body, or during peerage, etc.; and sometimes the time of enjoyment is marked by more than one of these means, as, for years, if A should so long live. In short, every time which can be fixed on for the duration of an estate, may, under the direction of a skillful conveyancer, be used with effect."—*Ib.* 25, 26.

Principles to be deduced from the foregoing authorities applied to the Mine-Owner's Estate.

1st. It thus appears that every estate held by feudal tenure was subject to forfeiture for breach of the conditions on which it was granted.

2d. That such an estate involved a constant acknowledgment of the grant as long as it subsisted, through the continuing obligation to render the stipulated service; it being "*une concession faite à la charge d'une reconnaissance toujours subsistante qui doit se manifester de la manière convenue.*"

3. That such an estate, in the vassal, is nothing more than the usufruct, as the term is used by Blackstone, (not as used by Escriche) or *dominium utile;* while the estate of the donor in the feud is the *dominium directum*, or *proprietas.*

4th. That by the common law of England, an estate in land, limited to a man and his heirs, which may endure forever, is a *fee* or *inheritance determinable;* no matter how near the approach to

certainty that the event which is to determine it will happen to-day, or to-morrow, or within any given time; it being the mere possibility, however slight, that the estate may endure forever, and not the probability that it will be perpetual, which causes it to be ranked in the class of fees or inheritances.

These various modifications and subdivisions of the right of property, and of estates in land, under both the civil and common law, have been the subject of a special attention, because, in addition to the reasons before given, I desire in the outset to avoid a vein of error which runs through the whole of Judge Thompson's opinion on the question of jurisdiction. Judge Thompson contends that a mine-owner's estate hangs by a tenure so slight and uncertain that it cannot be considered an estate in land. This error I am quite sure he would not have fallen into, if, in the investigation of the case, he had to a greater degree refreshed his mind with the various modifications and limitations which may be made to measure the quantity of estates in land, and which cause the *probability of their duration*, which he loosely calls their *tenure*, to be in many cases infinitely more slight and uncertain than that by which the estate in a mine is held under the laws of Spain and Mexico; while, at the same time, such estates are not only estates in *land*, but are greater than freeholds, being *fees* or *inheritances determinable*.

"Admit it to be *possible*," says Mr. Preston, "that the interest *may* continue forever, and it will follow that the interest is a fee to all intents; and it will be deemed an inheritance, or estate which may be enjoyed in continual succession."

It will not be denied, I presume, that the terms upon which the mine-owner held his estate in the mine were of such a nature as to render it possible that the estate might continue in him and his heirs forever. I will show that these terms were easy, appropriate, and well defined; that the estate held under them was neither slight nor uncertain, but, on the contrary, full and perfectly assured; and that such estates were inheritances, belonging to a class well known to the Civil Law, and possessing certain determinate qualities and properties, not less well established than those of an estate in fee simple, or in fee determinable, under the common law of England.

It follows, then, that in the *determinable quality* of the mine-owner's estate, we see not the least *sign* that the estate, such as it is,

is not an estate in land. Neither from that quality of the state, by any mode of reasoning with which I am acquainted, can I infer with Judge Thompson, that "the right which a discoverer or denouncer could acquire in a mine was a mere incident to the land, or easement. On the contrary, if I felt at liberty to put the fanciful resemblances suggested by crude and hasty comparison, to the use of established premises in the support of legal conclusions, I should arrive, by such a process, at a result far removed from that to which Judge Thompson was conducted. For I perceive that the mine-owner's estate, as it exists under the Spanish and Mexican law, possesses many features in common with the estates which to the common law of England are known as fees determinable or conditional: and while I cannot discover in what particulars it at all resembles a right of way under the Common Law, with which Judge Thompson fancies it to be identical, I perceive many obvious and essential differences between the two, which keep them as distinct and separate as the poles. These differences will be noted hereafter.

The nature of a Mine-Owner's Estate in his Mine under Laws of Spain and Mexico.

My first proposition is, that the concession of a mine conveyed to the grantee full property in the very substance of the mine. The words used by the Spanish laws and decrees, and by the Commentators, in describing this right of property are: *Propiedad; propiedad y posesion; propiedad y usufructo; propiedad y utilidad; plena propiedad; dominio; pleno dominio; dominio absoluto y perpetuo; dominio directo y útil.* The meaning of these words I will give as they are defined by Spanish Jurists.

PROPIEDAD—"Is the right to enjoy and to dispose freely of the things which are our own, so far as the laws forbid not." "Property is divided into perfect and imperfect. The vinculum which exists between the proprietor and the thing which belongs to him is susceptible of effectual subdivision. When it is not divided—when no right of another intervenes to limit the exercise of the right of property—it is said that the property is perfect. When the vinculum is divided—when the exercise of the right of property is

limited by a right which belongs to another proprietor—it is said then that the property is imperfect. These substractions, these dismemberments, as I say, of the right of property, are called *servidumbres*, by analogy to the slavery of persons: for, as a person is in slavery when he owes his services to another, in the same way an estate or land (*predio ó heredad*) is in a species of slavery or servitude, when it owes its services to a person not its proprietor. Commonly the dominion which is not accompanied by the usufruct, is called property (*propiedad*) and also naked property, (*nuda propiedad*) and the dominion which is accompanied by the usufruct is called full property; (*plena propiedad*) that is to say, naked property is the right to dispose of a thing, without the right to take or enjoy its fruits, which latter belongs to another person: and full property is the right of both disposing of, and enjoying a thing."—*Escri. Dic. Verb. Propiedad.*

Dominio—"The right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent it. This free disposition embraces principally three rights, which are:—1st, the right to alienate; 2d, to receive all the fruits; 3d, the right to exclude others from the use of the thing. Dominion is divided into full, and less than full, (*pleno y menos pleno*) or into perfect and imperfect. The less than full (*menos pleno*) is subdivided into direct and useful, (*directo y útil*) the most common kinds of the less than full dominion are the feud, an alienation or perpetual ground rent, (*enfiteusis*) and the right of superficies (*el derecho de superficies.*)"

Dominio Pleno y Absoluto—"Is the power which one has over any thing to alienate it, independent of another; to receive its fruits; and to exclude all others from its use."

Dominio Directo—"The right a person has to control the disposition of a thing, the uses (*utilidad*) of which he has ceded; or to receive a certain payment or annual tribute in recognition of his Seignory, or superiority (*superioridad*) in land (*un fundo*); or in other words, the right of superiority in a thing real, without the right of useful property (*sin el derecho de la propiedad útil*); such is the dominion which is reserved by the proprietor of land (*finca*) who alienates it by feudal or emphyteutic title."

Dominio Util—"The right to receive all the fruits of a thing,

subject to some contribution or tribute, which is paid to him who reserves in it the *dominium directum;* such is the *dominium* which the vassal, or alienee in emphyteutic title holds in the land which he has taken as a feud, or as an *enfiteusis.*"—*Escri. Dic. Verb. Dominio.*

Whence it follows, that when both the parts or fractions of *dominium*, the *directum* and the *utile*, each one of which is less than full dominion, unite in one person, he has the *dominio pleno.*

"The power which a man has, freely to dispose of what is his own (*de lo suyo*) if the law, or some contract, or the will of the testator, does not forbid it, is called *dominio.* This name is also frequently given to property; but notwithstanding, it must be borne in mind, that the word *dominio* expresses only the *right*, and that property (*la propiedad*) is applied also to the things which are the subjects of this right; *dominio* is referred only to things, property, to things and persons.—Sometimes property (*la propiedad*) indicates dominion over a thing, without the right to enjoy its fruits, in which sense it is called naked property (*propiedad desnuda*). *Dominio* is divided into full and less than full. The first occurs when the power of disposing of a thing, and that of using it, unite in one and the same person; and the second, when these rights are divided between two or more persons. *Dominio* less than full is subdivided into direct and useful; he who has the power of disposition being called the direct owner, (*dueno directo*) and he who enjoys the usufruct only, the owner of the use (*dueno útil*)."—1 *Feb. Mejno.* 153, *Ed.* 1851. 2 *Sala Mejno* 29.

From the foregoing authorities it appears that the words used in defining the mine-owner's state, describe the highest degree of dominion or right of property, which a man can have in a thing. His estate in the mine was allodial, for allodial lands are those, of which the owner has the *dominium directum et verum. Qui tenet in allodium, id est, in plenam et absolutam proprietatem, habet integrum et directum dominium, quale ã principio fuit distributum et distinctum.* So that the owner could dispose of it at his pleasure; or transmit it as an inheritance to his children."—1 *Gr. Cruise*, 6. "This, (*allodium*) is property in its highest degree; and the owner thereof hath *absolutum et directum dominium;* and therefore is said to be seized thereof in *dominico suo*, in his own demesne.

This allodial property no subject in England has. A subject has only usufruct, and not the absolute property of the soil; or as Sir Edward Coke expresses it, he hath the *dominium utile*, but not the *dominium directum*."—*Black. Com. B.* 2, *Ch.* 7.

DOMINIUM ALTUM OR EMINENS.—The *ownership* referred to in the foregoing definitions, of whatsoever nature, is subordinate to the *dominium altum or eminens*. Chancellor Walworth's description of this latter is very clear and precise. "All separate interests of individuals in property are held of the Government under this tacit agreement or implied reservation. Notwithstanding the grants to individuals, the *eminent domain*, the highest, and the most exact idea of property, remains in the Government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the Constitution and laws of the State, whenever the public interest requires it."—*Beekman* v. *Saratoga and Schenectady R. R. Co.*

The *eminent domain* is the natural, the necessary, the indefeasible right of society. To it, all rights of property, of individuals and corporations in all subjects of property, are subordinate, for the simple reason that such ownership is private.

The *allodial title*, the highest estate an individual can have in land, is subordinate only to the *dominium eminens*; for in the allodial proprietor, are united the *dominium directum*, and the *dominium utile*.

In the FEUD, these two are divided; the *dominium directum* being in the lord, and the *dominium utile* in the vassal. No subject in England has any higher right of property in land than the *dominium utile*, and the same says Mr. Greenleaf, as cited, is true of the people of the United States.

Blackstone translates *dominium utile* into *usufruct*. This meaning of usufruct we must be careful not to confound with *usufructo*, as understood in the Spanish law, where it is considered as one of the three species of personal *servidumbres*—the other two being *uso* and *habitacion*."—*Vide Escri. Dic.*

A Mine regarded as the subject of property under the laws of Spain is land.

My second proposition is, that a mine considered as a subject of property, or a thing to which the right of property relates, belongs to the class variously denominated in the Spanish law, *bienes raices*, *fundos*, *heredades*, *tierras*, *posesiones*, *predios*, *fincas*, which are equivalent to the common law term, *land*. As these words are used in defining each other, I shall give the definitions in the original, and also translations of them.

"BIENES RAICES. Los que consisten en haciendas de campo, como viñas, tierras, olivares, etc., ó en casas y otras cosas que no se pueden transportar de un lugar á otro." *Escri. Dic. Verb. Bienes raices.* Translation: "Those which consist in country estates, as vineyards, lands, olive plantations, etc., or in houses and other things which cannot be transported from one place to another."

The dictionary of the academy also defines *bienes raices* to be, "*Los que consisten en tierras y posesiones. Bona immobilia.* Translation: "Those which consist in land and real estate—immovable property."

"HEREDAD. Porcion de terreno cultivado:—y antigüamente, hacienda de campo, bienes raices, ó posesiones, como tambien herencia." *Escri Dic. Verb. Heredad.* Translation: "A piece of cultivated ground; formerly, a country estate, real property or possessions, as also an inheritance."

"FUNDO. En rigor es el suelo de una cosa raiz, como de tierra, campo heredad ó posesion: y se llama *fundo*, porque es el fundamento de toda riqueza, ó porque en el se fundan ó establecen muchas cosas, como arbolados, viñas, huertos, prados, edificios, *quod pecudum et pecuniæ videtur fundamentum, aut quod quotannis fundat multa*, segun dice Varron, *lib.* 4, *de ling. latin. Fundus*, dice Iaboleno (*in l. questio est*, 115 *de verb. signif.*) *est omne, quidquid solo continetur, id est fundamentum ejus rei quæ solo fundatur.* Pero en sentido mas estenso, *fundo* es una palabra collectiva, que significa el suelo con todo lo que hay en el; esto es una porcion determinada de terreno, cultivada ó inculta, con todo lo que contiene ó produce naturalmente ó por industria del hombre; y asi llamamos *fundo* á una viña, á un olivar, á un huerto, á un prado, á un

alameda, á un cortijo, granja, ó hacienda de labor y monte. *Escri. Dic. Verb. Fundo.* Translation: "Fundo is, strictly speaking, the soil of a thing real, as of land, a field, a piece of cultivated land, or possession, and it is called *fundo* because it is the foundation of all wealth, or because in it many things are founded or established, as plantations of trees, vineyards, gardens, meadows, houses, *quod pecudum et pecuniæ videtur fundamentum aut quod quotannis fundat multa*, as Varron says, *lib.* 4, *de-ling. latin. Fundus, dice Iaboleno (in l. questio est*, 115 *de verb. signif.) est omne quidquid solo continetur, id est fundamentum ejus rei quæ solo fundatur.* But in a more extensive sense, *fundo* is a collective name, which signifies the soil with all that is in it; that is to say, a determinate piece of land, cultivated or uncultivated, with everything which it contains or produces, either naturally, or by labor of man; and thus we apply the name *fundo* to a vineyard, to a plantation of olive trees, to a garden, to a meadow, to a grove of poplar trees, to a farm-house, to a grange, or to an estate containing arable and wood land." The Dictionary of the Academy defines *fundo* to be *heredad ó posesion.*

Escriche's definition of *fundo* might be used with perfect propriety by a common law writer, as a definition of land. Blackstone says: "Corporeal hereditaments consist wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath. It legally includeth, also, all earth, houses and other buildings: for they consist, said he, of two things; *land* which is the foundation, and structure thereupon; so that if I convey the land or ground, the structure or building passes therewith." —*Black. Com. B.* 2, *Ch.* 2.

"Predio. La heredad, hacienda, tierra, ó posesion inmueble. El predio es rustico, ó urbano. Predio *rustico* es la parte de tierra vacia que se cultiva ó beneficia de algun modo, como las hazas y heredades en el campo, y los huertos y jardines en el poblado. Predio *urbano* es el sitio en que hay edificio para habitar, ya sea en poblado, ó ya en el campo. No se distinguen pues los predios rusticos y urbanos por el lugar como querian algunas jurisconsultos

antiguos, sino solo por la calidad y el uso. El predio, sea rustico ó urbano, puede ser dominante ó serviente; es *dominante* el predio á que se debe alguna servidumbre, y *serviente* el que la debe, con tal que cada predio pertenezca á diferente dueño." *Escri. Dic. Verb. Predio.* Translation: "Cultivated grounds, country estate, land, immovable possession. The *predio* is rustic or urban. The rustic *predio* is the piece (*sitio*) of open land (*tierra vacia*) which is cultivated or improved in the same manner as cultivated fields and grounds in the country, gardens and orchards in villages. The urban *predio* is the site on which there is a building for habitation, whether it be in the city or country. *Predios*, rustic and urban, are not distinguished from each other by their location, but solely by their quality and use. The *Predio*, whether rustic or urban, may be dominant or servient; the *predio* is dominant to which any servitude (*servidumbre*) is due; and the *predio* which owes the servitude is *servient*, with the understanding that the two *predios* belong to different owners."

"Posesion. Is taken frequently from the thing possessed; and thus of him who holds much real property (*muchos bienes raices*) it is said he has many possessions (*muchos posesiones*)." *Escri. Dic. Verb. Posesion.* The Dictionary of the Academy thus defines the same word. "*Posesion* is frequently taken for the thing possessed, and thus of him who holds much real or immovable property, (*muchos bienes raices ó inmobles*) it is said that he has many possessions."

"Finca. La heredad ó posesion, en que alguno tiene derecho cobrar su renta, ó alguna cantidad determinada." *Escri. Dic. Verb. Finca.* Translation: "*Finca* is landed estate, or real immovable property, upon which a person has a right to collect rent, or a certain sum of money."

Tierras is defined by the Dictionary of the Academy as follows: "El espacio de terreno á proposito para el cultivo, labor y siembra. *Ager, Arvum.* "A piece of land suitable for cultivation, working and sowing." In Latin, *Ager, Arvum*, arable land, a field.

Citation of laws and other authorities wherein occur the foregoing terms, descriptive of the mine-owner's estate, and of the class of things to which a mine, regarded as the subject of property belongs.

Having thus made ourselves acquainted with the meaning of the terms in which the law and the commentaries describe the nature of the owner's right of property in the mine, and the class of things to which, considered as a subject of property, a mine belongs, it remains to show where these terms are used, and how applied.

The history of Mining Law in Mexico discloses three principal Codes which have successively been in force in that country. The first of these, known as the Old Code, was promulgated in the year 1563, in the reign of Philip II. The next one, promulgated in the year 1584, in the same reign, is known as the New Code. It repealed such provisions of the Old Code as were in conflict with itself, but none other. The third and last Code was promulgated in the year 1783, during the reign of Charles III, and is entitled The Mining Ordinances of New Spain. It does not expressly repeal any former laws, and therefore it is considered that all the provisions of such, not opposed to the Ordinances of 1783, were left in force.

These Codes were from time to time, altered and amended, and partly repealed by various laws, decrees and regulations emanating from the King of Spain; and more recently by the political changes incident to the independence of New Spain, and by the legislative enactments of the Mexican Republic.

When the Mining Ordinances of New Spain, or the Code of 1783, was promulgated, the Ordinances of the New Code had been in operation for two hundred years. They had prevailed during the season of the greatest activity and prosperity ever enjoyed by the mining interest of Mexico. Great properties and rights had grown up under them, and the habits, customs and practices of the miners of New Spain had for two centuries conformed to them. Besides the influence and consideration which these circumstances would inevitably attach to such an important and long-enduring Code of Laws, it has derived much celebrity from having been the special text of the Commentaries of Gamboa, which are everywhere regarded to this day as the ablest, and the most useful exposition

of the Mining Laws of Spain which was ever written. Nor are these commentaries even now without authority. For although the Codes they were written to elucidate and explain have been superseded since the year 1783 by other Ordinances, yet much of them remains unrepealed; the general principles of the Spanish Law are equally applicable to the last as to the preceding Codes; and the essential qualities of the subject to which these laws relate, and upon which the reason of the law is founded, exist to this day as they presented themselves to the mind of Gamboa.

The Mine-owner's estate as defined by the Ordinances of 1584, *the New Code on which Gamboa commented.*

The second of the Ordinances of the New Code (the Ordinances of 1584) describes the owner's right of property in a mine in the following words: "And in order to benefit and favor our subjects, and the natives of these kingdoms, and all other persons whatsoever, though strangers to these our kingdoms, who shall work or discover any silver mines whatsoever, discovered, or to be discovered, it is our will and command that they *shall have them*, (the mines) and that they (the mines) shall be *their own* in property and possession, and that they may have the power to do with them, and may do with them as with their own things, (*queremos y mandamos, que las ayan y sean suyas proprias, en posesion y propiedad, y que pueden hacer, y hagan de ellas, como de propia cosa suya*) observing both in regard to what they have to pay us by way of duty, and in all other respects, the regulations and arrangements ordered by this Edict in the manner hereinafter mentioned." (1 *Gamboa's Com.* 10.) The word *propia* as defined by the Dic. of Aca. *Verb. Propio*, means "those things which belong to a person with the right to use them freely and according to his will." It is difficult to conceive what terms, stronger or more explicit than the foregoing, could have been used to declare and define the mine-owner's right of property in the very substance of the mine. Our subjects shall *have* the mines which are, or may be discovered. The mines shall *belong* to them in property and possession. They shall have power to do, and may do with the mines, whatever they may do with their own private property. Surely, these terms admit of no doubt.

Indeed, so ample are the terms of this grant, and others of a like nature: as for instance, Law 1, Tit. 19, Lib. 4, Recop. de Indias, which declares the mines to be common: that many Spanish authors of the greatest reputation and ability have contended that the Crown had divested itself of its title to mines, and that they must be ranked among things common to all. Lagunez held this opinion, with the Cardinal de Luca. Gamboa, on the other hand, combated their views, and in paragraphs fourteen to twenty-three of Ch. II of his Commentaries, endeavors to refute their arguments. In the language of Gamboa, the question was this: "*Si las Minas de aquellos regnos deban estimarse como antes, propia Regalia de S. M. ó bienes libres de los vassallos,*" and the conclusion to which he arrives is, that notwithstanding the very ample terms of grant contained in the second ordinance of the New Code, and the laws of the Indies referred to, mines must still be ranked among the Royalties of the Crown. Or, in his own words: "*Y asi, aunque les concedieron dominio, y propiedad, es por participation, y no por translacion absoluta, quedando el alto dominio en S. M.*" "And thus, although they (the laws) concede dominion and property, it is as a part interest and not as an absolute transfer, the eminent domain remaining in His Majesty." In the same paragraph 19 of Ch. II, he has before spoken of the right of the Crown in mines, as the *dominio alto*. This *dominio alto* is what we understand by the *dominium eminens*, or the right of eminent domain. By referring to Title II, § 5, Vol. 1, p. 156 of the Mexican Febrero, edited in 1851 by Rivera, where the subject of the right of eminent domain is discussed, we shall find that the words *alto ó eminente dominio* are used as the Spanish terms for the *dominium altum* or *eminens* treated of by Grotius, Puffendorff, and other writers on public law.

"Much venerating, as is proper, the opinion of so learned a Minister as Lagunez, supported by that of the Cardinal de Luca," Gamboa thought that he had without the least necessity introduced the discussion of this question in the matter of which he was treating, namely, whether the metals are products, (*frutos*). "For," said Gamboa, "although they are not such strictly speaking, since they do not reproduce, it is enough that they are emoluments or civil products, (*frutos civiles*) to make all the effects of the law (*Derecho Comun*) attach."—*Gamboa Orig., p.* 18, § 23, 1 *vol. Tr.*, 27, § 23.

Gamboa's Description of the Nature of a Mine-owner's Estate.

In the next three paragraphs immediately following his reply to Lagunez, Gamboa describes fully and technically the quantity and quality of the mine-owner's estate in his mine. As these are very important paragraphs, I will quote them entire from the original.

§ 24. Quedando, pues, establecida la Regalia de S. M. en las Minas de las Indias, y ajustarse bien con el dominio y propiedad de los Vasallos; es inconcuso, que pasando, como pasa, á estos, para que pueden disponer de ellas como cosa suya, se verifican á su favor los efectos de la propiedad, y dominio, para permutarlas, venderlas, locarlas, y enagenarlas por contrato, donacion, ó herencia, dárlas en dote, imponerles censos, y pedir reditos de el precio, mientras no se pagáre; como que *el fundo* es fructifero, segun que con Garcia, Pedro Barbosa, Barbacia, Molina, Castillo, y Gutierrez enseña el Cardenal de Luca, hablando de aquellas Minas durables, y de vetas conocidas, segun la experiencia, cuyo fruto consiste en la saca de el metal, aunque éste no renazca. Y en el mismo lugar trahe las reglas mas sanas sobre la justicia del precio de la locacion. Pero todo esto se entiende con la precisa calidad, de que los successores universales, ó particulares se arreglen á las Ordenanzas, y cumplan con los cargos que imponen, por virtud de la Ley, que así lo dispuso.

§ 25. Y pasa á los Vasallos este dominio directo, ó propiedad, y tambien el útil, por virtud de la merced, y concesion de el Soberano, la que no dudamos llamar una modal donacion, atendidas las reglas con que ésta se mide en el derecho, que se reducen á ser un acto perfecto y liberal, despues de cuya consumacion se grava el donatario para el tiempo futuro, aunque las palabras se pongan á modo de condicion; y que por falta de el modo final, que estipúla á su favor el donante, ó de otro tercero, ó de el Reyno, ó de la República, espira la donacion, como puede vérse en varios textos, y DD.

§ 26. Las que se adaptan rectamente á esta Ordenanza segunda: en que dona S. M. *y hace gracia, y merced á sus Vasallos de la propiedad, y posesion de las Minas descubiertas, ó por descubrir, y que dispongan como de cosa propria suya:* que es el acto perfecto de donacion; pues por la merced no se paga precio alguno, ni para

registrar, ó denunciar. *Pero guardando* (prosigue la Ordenanza) *así en lo que nos han de pagar por nuestro Derecho, como en todo lo demás, lo dispuesto, y ordenado por esta Prematica en la manera siguiente:* que es el gravamen, ó modo que mira á la paga de el quinta en lo futuro, y á la observancia de las Ordenanzas, en lo que concierne á la labor, pueble, medidas, y demàs, que debe guardarse, y por cuya omision, ó defecto, queda extinguido el dominio, y la Mina denunciable por qualquiera otro tercero.

These sections we translate as follows:

"§ 24. The rights of His Majesty in the mines of the Indies being then established; and those rights being perfectly consistent with the dominion and ownership (*el dominio y propiedad*) of the subject therein; it is incontrovertible that this property, passing as it does pass to the subjects, so that they may dispose of mines as of their own things, (*como suya cosa*) there are proved to exist in their favor, the consequences which result from ownership and dominion, (*propiedad y dominio*) wherefore they may exchange them, sell them, lease them, and alienate them by contract, donation or inheritance, give them in dowry, charge them with rent, (*censos*) and recover interest on the price for which they may be sold, while it remains unpaid; as this kind of real property yields products, (*como el fundo es fructifero*) as the Cardinal de Luca teaches, along with Garcia, Pedro Barbosa, Barbacia, Molina, Castillo and Gutierrez, when speaking of those which are durable. And in the place cited, de Luca also deduces very sound rules as to the justice of reserving rents on a lease of mines. But all this must be understood with the necessary qualifications, that those to whom the property devolves by universal or particular succession must conform to the Ordinances, and fulfill the obligations which they impose, by virtue of the law, which thus directs.

"§ 25. And there passes to the subject this *dominium directum*, or right of property, (*ó propiedad*) and also the *dominium utile*, by virtue of the gift and concession of the Sovereign, which we hesitate not to name a gift with a charge, (*una modal donacion*) bearing in mind the rules by which that species of gift is defined in the law, which are reduced to these, that the gift is a free and complete act, which being consummated, a charge attaches to the donee from that time forth, although it is worded as if it were a condition. And

that upon the failure to comply with this definitive charge, which the donor stipulated for in favor of himself or of a third person, or of the Kingdom, or of the Republic, the gift expires, as may be seen by referring to many texts and Doctors.

"§ 26. Which rules [meaning the rules of law defining a *modal donacion*.—TR.] apply justly to this second Ordinance: in which His Majesty gives "*and makes a grant (gracia y merced) to his subjects of the property and possession of mines, discovered, or to be discovered, and that they may dispose of them as of their own things*," this being the complete act of gift; since for the gift no price is paid, neither for registering nor denouncing. "*But*," proceeds the Ordinance, "*observing, both in regard to what they have to pay us by way of duty as in all other respects, the regulations and arrangements established by this edict, in the manner hereinafter mentioned:*" which is the charge, or qualification, looking to the payment of the fifth from that time forth, and to the observance of the Ordinances in what relates to the mode of working the mines, the number of hands to be kept at work in them, their boundaries, and other matters required to be observed, upon the omission or nonperformance of which, the right of property (*el dominio*) is extinguished, and the mine becomes liable to be denounced by another."

In the foregoing sections, the right of property in the mine is called *dominio, propiedad, dominium directum et utile;* one of the two elements essential to the full right of property, to wit, the right to dispose of the thing, is dwelt upon and illustrated, and the various modes of its exercise specified, comprehending all legal modes of alienation, whether *inter vivos* or *causa mortis;* the right of use, enjoyment and perception of fruits, the other essential element of the full right of property, is declared to exist, and the mine, the thing to which these rights relate, is declared to belong to the class called *fundos*, or lands. Here is attributed to the mine-owner the right of property in its highest degree; and the mine which is the subject of this right, to recur to the definition of *fundo*, "is, strictly speaking, the soil of a thing real," or, "in a more extensive sense, it is a determinate piece of land, with everything which it contains, whether produced naturally or by labor of man."

In another place, Gamboa, speaking of the right of foreigners to

work mines, says the law of the Indies does not make any such particular mention of foreigners: for their residence in those parts being prohibited by the laws and municipal statutes, unless specially permitted under letters of naturalization, they cannot apply themselves to the working of the minerals of that country. But it is otherwise where foreigners have resided in the Indies for twenty years, married, &c., and owning real property, as a mine is (*teniendo bienes raices como lo es la Mina*). The laws of the Indies to which he refers are 31 and 32 of Title 27, Book 9. The first of these declares that a foreigner, to be considered naturalized, so that he may be allowed to trade in the Indies, must have resided there for twenty successive years, during ten of which he must have owned a house and real property (*teniendo casa y bienes raices*); and by the second it is required that the real property (*bienes raices*) so held by foreigners, to be attended by naturalization as a consequence, must be of the value of at least four thousand ducats.—*Gamboa, Orig. Ch.* 2, § 28. 1 *Heath. Trans.* 30.

"Besides the above mentioned objects," says Gamboa, (Ch. 5, § 5, Orig. p. 104) "another important end is attained by registry, namely," &c., "by which means not only the rights of individuals in relation to the mines are assured, and such important landed estates preserved in a regular course of succession, (*y de arreglar unos fundos tan importantes*) but," &c.

Speaking of the mines belonging to infants being denounceable like others, when not kept in operation as required by the Ordinances, Gamboa says; "It is with a view to provide for a case of this kind that the laws of Peru direct, that upon the death of a proprietor of a mine, his executors shall, if the heirs be in Spain, sell it like other landed property (*como otros bienes raices*) within thirty days.—*Gam., Orig. Ch.* 17, § 22. 2 *Heath. Trans.* 95.

And again, on the subject of the privileges of miners, Gamboa says: "The authors above cited reckon as another privilege, that of acquiring nine-tenths of the metals, paying to His Majesty only one-tenth in acknowledgment of his having given them the *dominium directum et utile* in such valuable lands (*el dominio útil, y directo de tan preciosos fundos*)."—*Gam., Orig. Ch.* 21, § 15. 2 *Heath. Trans.* 157.

The nature of the estate in mines is further shown by the char-

acter of the proceedings in suits relating to the right of possession, or to the right of property in them. The Sixty-third and Sixty-fourth of the Ordinances of the New Code prescribe the method of litigating questions involving these rights. The Sixty-third Ordinance relates to the possessory action, for the recovery of possession merely, leaving undecided the right of property. In his Commentary on these Ordinances, Gamboa says: "Every kind of Interdict and subordinate variety of Interdict, whether framed for originally acquiring, maintaining or securing the possession of immovable or real property, (*de bienes inmobles ó raices*) will hold with regard to the possession of mines."—*Gam., Orig. Ch.* 23, § 6. 2 *Heath. Trans.* 258.

Whatever may have been the true nature of the mine-owner's interest, and to whatever class of property a mine may really have belonged according to the New Code, it is clearly impossible for one who has taken the pains to understand Gamboa's Commentaries to doubt, that in his opinion that interest was the *dominium directum et utile*, the highest degree of the right of property, and that a mine was regarded by him as real, immovable, landed property.

The Mine-owner's estate defined by Ordinances of 1783. *These were promulgated a few years after Gamboa wrote, and adopt his views.*

Whether the learned Minister Lagunez, and the Cardinal de Luca, were right or wrong in holding that by the very ample terms of the second ordinance of the New Code, and by other laws and decrees of the Indies, the King of Spain had divested the Crown of its titles to mines, and granted them to his subjects; whether Judge Thompson is right or wrong in holding, on the other extreme, that those laws gave to the discoverer of a mine no right, title, or estate whatever in the mine; whether Gamboa was right or wrong in his opinion, which in the course of human events has turned out to be *in medio* between the oldest and the newest commentators, that while the King preserved his rights of royalty, or the right of eminent domain in mines, this right was perfectly consistent with the *dominium directum et utile* therein, which he had granted to

his subjects: all these questions are matters of useless speculation. For the Mining Ordinances of New Spain, framed and promulgated a few years after the publication of Gamboa's Commentaries, adopt his views, both as regard the rights of the crown, and the rights of the subject in mines, and make the law to be such as he said it was.

The correctness of the foregoing assertion will be manifested by comparing the twenty-fourth, twenty-fifth and twenty-sixth paragraphs of the second chapter of Gamboa's Commentaries, which we have quoted in full from the original, with the fifth title of the Mining Ordinances of New Spain. This title has the caption, "*Del dominio radical de las Minas: de su concesion á los particulares; y del derecho que por esto deben pagar.*" "Concerning the fundamental ownership of Mines: their concession to individuals; and the duty which therefor must be paid."

"ART. I. Mines are the property of my Royal Crown, as well by their nature and origin, as by their reunion declared in Law 4, Title 13, Book 6, of the Nueva Recopilacion"——. This article declares the rights of the crown in mines. It uses as descriptive of that right the term *dominio radical*, which is not a technical expression, but which we infer from the second article, conveys very much the same meaning as the *dominium altum* of which Gamboa spoke.

"ART. II. Without separating them from the Royal Patrimony, I grant them to my subjects in property and possession (*en propiedad y posesion*) in such manner that they may sell them, exchange them, rent them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the mines belongs to them, on the same terms in which they themselves possess it, and to persons capable of acquiring it"——. This article, without separating the mines from the Royal Patrimony, grants them to individuals in property and possession. It accords entirely with the opinion of Gamboa, where he says, § 24, Ch. II: *Quedando pues establecida la Regalia de S. M. en las Minas de las Indias, y ajustarse bien con el dominio y propiedad de los Vasallos; es inconcuso,*" *etc.* "The rights of His Majesty in the mines of the Indies being then established, and they being perfectly consistent with the ownership and right of property of the subject therein, it is incontrovertible," etc. Not content with the general declaration that the mine-owner has the right of property and pos-

session, this article proceeds to enumerate the essential attributes of that right. The power of disposition is given in the largest terms, and almost in the very words of Gamboa, when he declares that element of the right of property as conferred by the New Code. The right to use, enjoy and receive the fruits of the mine, is given in the right of possession, which is declared to accompany the right of property.

"ART. III. Let this grant be understood to be upon two conditions:—first, that they (the mine-owners) shall contribute to my Royal Treasury the prescribed portion of the metals; and, secondly, that they shall work and enjoy the Mines, complying with what is prescribed in these Ordinances, so that the mines shall be considered forfeited (*perdidas*) whenever a failure shall occur in complying with those (ordinances) in which it is so provided, and they may be granted to any person who for that cause may denounce them." This article specifies the conditions of the grant, or in the language of Gamboa, it imposes "the charge or qualification" upon "the complete act of gift," which is made by the second article. "And there passes to the subject this *dominium directum*, or right of property, (*ó propiedad*) and also the *dominium utile*, by virtue of the gift and concession of the Sovereign, which we hesitate not to name a gift with a charge, (*una modal donacion*) bearing in mind the rules by which that species of gift is defined in the law, which are reduced to these, that the gift is a free and complete act, which, being consummated, a charge attaches to the donee from that time forth, although it is worded as a condition," etc. That the estate thus created is determinable, "upon the failure of the thing constituting the object of the gift, which the donor stipulated in favor of himself, or of a third person, or of the Kingdom, or of the Republic," induces us to liken such an estate to either a fee determinable or a fee conditional at the Common Law. (*Gam. Orig. Ch.* 2, § 25.)

The Mining Ordinances of New Spain, or as I shall call them, the Ordinances of 1783, in Article 1 of Title 15, describe one of the modes of contracting for supplies for the working of a mine, to be "by giving the supplier a part interest in the mine itself, THUS MAKING HIM FOREVER OWNER OF IT, (*ó interesandose el Aviador en parte de la Mina, haciendose para siempre Dueño de ella*)" etc.

And again in article nine of the same title, it is said, "when supplies are furnished under a contract of partnership in the ownership and property (*dominio y propiedad*) of a mine," etc.

The Mine-owner's estate as described in the decree of the Cortes of January 26th, 1811.

On the twenty-sixth of January, 1811, the Cortes of Spain issued a very important decree, abolishing the Royal monopoly of quicksilver which had been established by Law 1, Title 23, Book 8, of the Recopilacion of the Indies, and repealing Article 22, of Title 6, of the Mining Ordinances of New Spain, in so far as it reserved to the Crown the right to decide whether such quicksilver mines as might be discovered should belong to it, the discoverer being equitably rewarded, or should be worked by the latter on terms to be fixed by the Government. This decree was communicated to the Tribunal General of Mining in Mexico, with an order of the Council of Regency of the same date addressed to that Body, directing its execution, and suggesting the mode in which its objects might be most effectually secured. The Decree and Order are to be found at the end of Title 6, Ordinanzas de Mineria, Mexican Edition, 1848, and in Halleck's Comp. p. 381. They are referred to in this place, because they contain very strong expressions, which agree with the foregoing citations, and fully sustain our propositions. They concede "the full ownership of mines of quicksilver, and the right to acquire them," (EL PLENO DOMINIO *y acquisicion de las Minas de Azogue*) and "free trade in their products," (*libre comercio de sus frutos*). They give to the possessor of such mines the right of property in them, and their exclusive enjoyment, without any obligation to sell them to the State, and grant them permission to sell the products of such mines to the persons who will pay the highest price for the same; "*y que sus poseedores conserven su* PROPIEDAD Y USUFRUCTO, *sin que in ningun caso puede obligarseles á enagenarlos al Estado; dandoles permiso ademas, para que venden sus frutos á quien major se los pague.*" They assure "in an inviolable manner the right of property in, and the enjoyment of, such real estate, and dissipate the well founded fears which have

prevented individuals from taking charge of such mines." *Asseguran de un modo inviolable la* PROPIEDAD Y UTILIDAD *de tales* FINCAS, *y desvanecen los fundados temores que retraian á los particulares para tomarles á su cuidado.* They guarantee "the security of the miner's perpetual and absolute ownership, so long as he shall conduct and work such mines, according to the regulation of the laws on that subject," *la seguridad del* DOMINIO ABSOLUTO Y PERPETUO *del Minero, con tal que en seguirlas y labrarlas observe las reglas dadas por punto general en la materia.*"

The foregoing Decree and Order are a part of the Mining Law of Mexico. They did not, in my opinion, enact any provisions touching the right of property in mines of quicksilver different from those which had been established by the Mining Ordinances of New Spain in respect to other mines. On the contrary, it was their object to place such mines on the same footing with those of gold and silver, and other metals, as respects their acquisition, use, and disposal, by abolishing the Royal monopoly in quicksilver, and by repealing such particulars of the Mining Ordinances of New Spain as excepted mines of quicksilver from the general provisions of those Ordinances relating to the acquisition of mines, and the right of property in them.

The Mine-owner's estate as described by Mexican Decree, October 7th, 1823.

A decree of the Sovereign Provisional Junta of Mexico, dated the seventh of October, 1823, after suspending all laws which prohibit foreigners from acquiring and working mines, declares the effect of this suspension shall be only to enable foreigners to make contracts of every kind with the owners of mines (*los duenos de las minas*) which need supplies, even to the extent of acquiring in property shares in the negotiations which they habilitate; but they must take care to remain subject in all things to our Ordinances concerning the working of mines, and the reduction of minerals, and to the other obligations and charges with which the nation concedes the property in that kind of land to every citizen (*y á las demas obligaciones y cargas con que la nacion concede* LA PROPIEDAD *en tales* FUNDOS *á todo ciudadano.*)"

The Mine-owner's estate as described by Lares and Colmeira, in their works on Derecho Administrativo.

Referring to the decree just mentioned, Lares, a Mexican author, in his Derecho Administrativo, p. 93, remarks: "In this notable disposition the Legislature recognizes two principles of the utmost importance: first, the Ordinances of Mining (of 1783) are in force, and that by them must be regulated the working of mines; second, that the nation is the person who grants property in mines (*que concede la propiedad de las minas*). But how can the nation grant that which it has not; or how can it give to one person what belongs to another? The law, then, has not recognized property in the mine to be in the owner of the soil, but has made property in a mine to consist in the grant (*concesion*) which the nation makes to him who registers or denounces it, conformably to the Ordinance.

"This same principle is discovered in the decree of the eleventh of March, 1842, which enabled foreigners to acquire real property. In speaking of mines, it enables foreigners to acquire in property those of which they may be discoverers, in conformity with the Ordinance of the branch. Here again the *property* is seen to be identified with the grant, by means of the discovery in the mode determined by the Ordinance of 1783.

"There is no doubt, then, that our legislation, like the French, distinguishes the property in the soil from the property in the mine; recognizes that only the nation can grant this latter species of property, and establishes that the grant is made in the mode determined by the Ordinance of 1783."

The same principle is asserted by Manuel Colmeira, Professor of Public and Administrative Law, at Madrid, with great clearness and force. He says: "Jurisconsults and Publicists agree in the opinion that it is proper to distinguish in the soil (*en el suelo*) the right of property in the superficies (*de la superficie*) from that in the depth (*del fondo*). Truly, the man who acquires a piece of land gives not the least labor, nor advances the smallest capital in consideration of the riches (*las riquezas*) which it may conceal. He examines its fertility, its situation, its extent, and all the circumstances which determine its value as a building lot, or agricultural land; but he does not take into account the mines which per-

chance it may conceal in its bowels. There is not then the least relation between the proprietor (of the land) and the subterranean matter, from which any right can be deduced." "A mine not being an object of accession, nor the produce of labor, we must seek elsewhere the titles by which it is owned and enjoyed (*en otra parte debemos buscar los titulos de su propiedad y aprovechamientos*)."—*Colm. Der. Adm. Esp. Nos.* 1430, &c.

Comonfort's Decree of the first of February, 1856.

Art. 1. Foreigners domiciled and resident in the Republic may acquire and possess country and city property, (*propiedades rusticas y urbanas*) *including mines* of all kinds of metals, and stone coal, whether by purchase, adjudication, denouncement, or by any other title of ownership whatsoever, (*cualquiera otro titulo de dominio*) established by the common law, (*leyes comunes*) or by the Ordinances on Mining.

Art. 7. Foreigners who may acquire property, rustic, urban, or in mines, *propiedades rusticas urbanas ó de minas*) &c.—1 *Archivo Mexicano*, 666.

A Mine as defined by Escriche.

MINA—That part of the earth (*tierra*) in which metals or minerals are formed.

I think the foregoing authorities sufficient to satisfy the mind of a reasonable inquirer that the mine-owner's estate is a right of property in and to the very substance of the mine; and that the mine, regarded as the subject of property, belongs to that class of things, under the laws of Spain and Mexico, which the common law of England denominates *land*.

Pursuing the question a step further, I propose to fortify the propositions which I have established on the words of the ordinances, and the opinions of learned writers, by setting forth the reasons of the law; and these I will deduce from the nature of their subject matter, and illustrate by brief reference to the legislation of many European States.

The difference between Minerals and other parts of the Earth's substance leads to separate and distinct Legal Provisions.

So entirely different in their qualities are the various materials which compose the earth—so different are they in their uses, in their value, and in the means by which they are rendered available—that the laws of all nations, with perhaps a few insignificant exceptions, have treated these differences as the fundamental grounds of separate and distinct policies.

The first legal and necessary consequences of these essential differences, is the division of the earth's substance into two species of things, each of which, regarded as the subject of property, is to be acquired, used and disposed of, in the mode, and upon the terms prescribed for that species. Although the things belonging to each species possess all the attributes of land, being immovable corporeal hereditaments, and the name *land* is therefore generic, and in strict legal acceptation applicable to both species, yet, in common parlance, and frequently even in legal language, this generic name is used to designate one of the two species, while the other is called a mine, or vein, or stratum, or by some other characteristic name. The nomenclature is not perfect, but sufficiently so for all practical purposes; for, while the name *land* is usually applied to one species, from the greater frequency of its use in that respect, its definition is so plain that no one can fail to perceive that it includes both, when it becomes necessary to predicate of either, the generic attributes of land.

From this division results the rule of construction common to all codes which recognize these two species of property, that a grant of land by the sovereign does not convey the minerals imbedded in the earth. What things are considered as not passing by such grants, depends upon the distribution of the various materials of the earth between the two species, or upon what things are considered as belonging to each. In this respect the laws of the various States differ. Thus, in England, a grant of land by the king does not convey the ores of gold and silver, or the substances with which these metals are mixed or combined; but it conveys all the rest of the earth's substance, from the surface to the centre. Under the Spanish and French laws—indeed, under the laws of nearly all the

States of Europe—this rule of construction has a much larger operation; for by them a much greater number and variety of things are assigned to that species of property which is governed by provisions relating to the acquisition, use and disposal of mineral substances. By the Spanish Ordinances of 1783, Title 6, Art. 22, "not only mines of gold and silver, but also mines of precious stones, copper, tin, quicksilver, antimony, zinc, bismuth, rock salt and any other fossils, (whether perfect metals or half minerals) and bitumen or mineral tar," are embraced in the species to which the provisions of the Mining Ordinances apply. By the French law of 1810, gold, silver, platinum, mercury, lead, iron, copper, tin, zinc, calamine, bismuth, cobalt, arsenic, manganese, molybdenum, plumbago, and a variety of other substances, whether enclosed in the bosom of the earth, or existing on its surface, do not belong to the owner of the soil, but are governed by mining laws.—*Teulet's Sup. to the Codes, Verb. Mines, p.* 133.

This rule of construction in the English law will be found in 8 *Bac. Ab., p.* 40.

"As a consequence of this liberty to seek for mines," says Gamboa, "extended absolutely to all persons, it follows that they must be regarded as not having passed with grants of land (*fundos*) from the Sovereign, unless particularly mentioned." (1 *Heath. Gam.* 132.) To the same effect is Solorzano in his *Pol. Ind. lib.* 6 *ch.* 1, *No.* 17, where he says, "so that although private persons may allege and prove that they possess such lands (*tierras*) and their appurtenances by special gift and concession from the same Princes, no matter how general may be the words with which the grant is made, this will not of itself be of any avail or advantage to them for acquiring or gaining thereby the mines which may be discovered in the lands, unless it is so especially provided and expressed in said grant." In reference to this rule of construction, and to the reasons on which it is founded, Colmeira, as above stated, remarks that "Jurisconsults and Publicists agree in the opinion that it is proper to distinguish in the soil, (*en el suelo*) the right of property in the superficies, (*de la superficie*) from that in the depth, (*del fondo*). There is, then, not the least relation between the proprietor [of the superficies] and the subterranean matter, from which any right can be deduced." "A mine, not being an object of

accession, nor the produce of labor, we must seek elsewhere [that is, than in the title to the superficies] the title by which it is owned and enjoyed." Lares, in the place above cited, says: "The law, then, has not recognized property in the mine to be in the owner of the soil, but has made property in a mine to consist in the grant which the nation makes to him who registers or denounces it conformably to the ordinance."

The French law of 1810 declares that, "Mines shall not be worked except in virtue of an act of concession, deliberated in the Council of State. That act [of concession] regulates the rights of proprietors of the surface (*des proprietaires de la surface*) in the products of the mines which are granted."

It gives the perpetual right of property in the mine, which is henceforth disposable and transmissible like all other things, etc. "Mines are immovable property." "From the moment when a mine shall be conceded, even to the proprietor of the surface, this property shall be distinguished from that of the surface, and thenceforth considered as a new property."—*Teulet, sup. aux Codes, verb. Mines.*

M. Le Guay, in his *Thesis on Mining Legislation*, says: he agrees with Mirabeau in the proposition, that any legislation which does not recognize two species of property, one in the surface of the earth, and the other in its depth, would be absurd. Page 125.

That this subdivision of the earth into two distinct species of property, each of which is regulated in its acquisition and enjoyment by a code of laws suitable to itself, is a principle of legislation common to almost all the States of Europe, will be established by the following authorities.

M. Blavier, in his work *On the general Jurisprudence of Mines in Germany*, under the head of "Essential Conditions of good Legislation," uses the following language.

"It is a truth which has been admitted for a long time, that the preservation and prosperity of mines depend essentially on the adoption of a system of laws calculated to reconcile the interest of the public with that of those who work them. It is undoubtedly to reach that end, in a manner more or less direct, that the governments of ancient and modern nations published general or particular regulations on so important a matter.

"These regulations vary in their substance, according to the principles adopted in each country on the question of the ownership of the mines; whether it is considered inherent in the soil, or, on the contrary, is regarded as public property. In the last case, the sovereign can alone enjoy them, and when he does not do so himself, he must reserve to himself the most rigorous superintendency over those to whom he grants the useful ownership, (*propriéte utile*).

"Long experience proves that the European States, in which the working of mines has taken the widest range, and where it has been kept up with the greatest assiduity, are those where legislation is based upon (*la liberté des Mines*) the free working of mines; subjected, however, to the active superintendence of a just, strict and paternal administration, exercised under the eye of the Prince.

"It is these conditions which the governments of ancient and modern States have made efforts to fulfill, in admitting nearly all of them, that the sovereign alone has the right to dispose of the public property in mines, or to confer on others the useful enjoyment thereof."

The expression, *liberté des mines*, is defined by *Richard. Legis. des Mines, p. 3 note*, as follows: "The regalian right in mines (in Germany *Bery Royal*) means the right reserved by the whole State, represented by the sovereign, to dispose of subterranean property as a public property, independent of the private ownership of the land which conceals it, and for the greatest advantage of society. The most general application of the regalian right, is what we call freedom of mines, (*liberté des mines*) after the German (*Bery Royal*). Freedom of mines (*liberté des mines*) signifies the right granted by the sovereign to every individual, to partake of subterranean property, by working (*exploitant*) mineral substances, whether in his own land, or in that of another; but always conforming, under the continual direction of the sovereign, to well defined conditions, capable of assuring the preservation of both mineral and agricultural wealth."

The regalian right in mines is defined by Cancrin, in his *Droit Public des Mines en Allemagne*, translated into French by Blavier, p. 2, as follows:

"By the name of *regalian right* is understood the right inherent

in the sovereign character, and which rests on the distinction to be made between public property or that of the State, and private property.

"According to the German statutes, its origin appears to date back to the most remote periods of mining enterprise. It was held by Charlemagne as forming an essential part of the rights of the prince.

"The regalian right was transferred by the Emperors of Germany to the different sovereigns of that country; and, since then, it became, for each of them, individual property, which sometimes they nevertheless enjoy in partnership, where their territories adjoin one another; that common enjoyment is regulated by common particular conventions."

On the nature of the *regalian right*, M. Blavier makes these remarks:

"The regalian right, from the exercise of which results the liberty of working the mines, (*berg freiheit*) is based on the principle that mines should be declared public properties, because, in truth, they belong to no one in particular; that they should be worked for the greatest interest of all; and, besides, that end will always be reached more securely, on the part of the sovereign, if he works them himself, or by the intervention of those whose labors are placed under his superintendence, than by the owners of the soil. That question has been solved in the affirmative, in favor of the regalian right, by M. Heron de Villefosse, after having examined the contrary opinion of different jurisconsults.

"The same opinion was held by Mr. Karsten, in the work published by him in 1818, under the title of *Archives for the Working of Mines and Reducing Establishments.*

"It is therefore not surprising that the regalian right should have been confirmed by nearly all the governments of the northern countries."—*Blavier Juris. des Mines, Note, p.* 3.

The existence of the regalian right in mines, its nature, the extent to which it has been used, and the mode of its exercise by the various nations of Europe, have been fully shown by M. Heron de Villefosse, in his great work on *La Richesse Minerale.* This work I have not been able to procure; but M. Blavier, in the volume to which I have referred, gives a summary of De Villefosse's

exposé, from which it appears that as far back as the time of the Athenians, mines were regarded as the property of the Republic, and were sold or leased by the State. The same was the case in the Roman Empire. Among the modern States of Europe, the same principle prevails in Germany, Austria, Upper Saxony, Bavaria, Westphalia, Hesse, Mansfeld, Hanover, Prussia, Sweden, Norway. "In England," he says, "gold and silver mines are the only ones to which the regalian right really is applied. The Prince also reserved to himself the free exercise of that right, in regard to lead mines in Derbyshire, and those of tin in the county of Cornwall." "All other mines are considered as property inherent in that of the soil; and in consequence of this principle, every owner of the surface may work them freely without permission," etc.—*Blavier, Jurisp. des Mines, Preface, p. v, et seq.*

"In Spain," he says, "the regalian right is exercised in different ways by the Government.

"Hence it is, that it reserves to itself the working of several mines, and leases them to individuals;

"That it gave limited permission to search for mines, which, nevertheless, cannot be put in operation, unless a special grant, which it is the duty of the Superior Council to make, be delivered and obtained;

"That it disposes of the products of certain establishments, buying them at a fixed price;

"That it subjects all those who undertake the working of a mine to certain duties, which are fixed by the grant."—*Blavier Jurisp. des Mines, ut supra.*

M. Blavier clearly refers here to the law of Spain of 1825, about which much may be learned from Escriche, and not to the Ordinance of 1783, intended for New Spain, and subsequently put in force in other Spanish dominions in America.

The Pragmatica of Don Alonzo XI, in the year 1383, shows that, at that early day, mines were considered the property of the Crown.—*L. IX, Tit. XVIII, Law* 1, *Nov. Recop. Halleck's Col.* 4.

The law promulgated by Don Juan I, at Birbiesca, in 1387, may be regarded as the first Spanish Mining Ordinance. It grants a general right of search in all lands, whether public or private, for

mines of gold, silver, quicksilver, and tin and stones, and other metals. "And all that *shall be found and taken out from said mines*, shall be divided as follows: First, there shall be delivered and paid therefrom to the person who has taken out the mineral, all the expenses which may be incurred in excavating and extracting it; and of that which may remain, after deducting said expenses, the third part shall belong to the person who has taken it out, and the other two-thirds to ourself."—*Lib. XI, Tit. XVIII, ley* 2, *Nov. Recop. Halleck's Col.* 5.

This law gave a mere *license* to search for and work mines, and did not grant to the discoverer a right of property in them. Neither was registry required, nor did it define the size of a mine. I draw the attention of the Court to the terms of this Ordinance, contrasting so strongly as they do with the Ordinances of 1584 and 1783, in respect to the right of property in mines, granted by the latter.

The important law of January 10th, 1559, in the reign of Philip II, resumed all grants of mines of gold, silver and quicksilver, and incorporated them in the Royal Crown. "We reclaim, resume, and incorporate in ourself, and our crown and patrimony, all the mines of gold, and silver, and quicksilver, of these our kingdoms, in whatsoever parts and places they may be," etc. "And we will that said mines shall and may henceforth (without any other act of seizin [*aprehension*] and possession) belong to our said crown and patrimony, in accordance with, and as by the laws of these kingdoms, and ancient usage and custom, they do belong to us," etc. "This reclamation and incorporation in our royal patrimony," the law declares, "are not made with the object that we alone, or that others in our name alone, shall search for, discover and work such mines; but as, on the contrary, it is our intention and will that our subjects and citizens shall participate and have a part in said mines, and engage in the discovery and working of them; therefore, by these presents," etc. The law then proceeds to give a general right of search, and to give such mines as may be discovered to the discoverer.—*Lib. IX, Tit. XVIII, l.* 3. *Nov. Recop. Halleck's Col.* 6.

Next in order come the Mining Ordinances of 1563, known as the Ordinances of the Old Code, whereby the King, in the exercise

of his right of property in mines, disposes of them to his subjects on the terms and conditions named.—*Lib. XIII, L. V., Recop. de Castilla. Halleck's Col.* 17.

These were succeeded by the Ordinance of 1584, known as the Ordinances of the New Code, and afford a still stronger instance of the exercise by the Crown of its right of property in mines, in the grants which are made of them to discoverers and workers.

The second article of these Ordinances declares, that, in order to benefit and reward subjects or foreigners who discover and work mines of silver, "we will and command that they shall have the mines, which shall be their own private property in possession and ownership, and that they shall have power to do, and may do with the mines whatever they can do with their own private property." The original is in these words: "*Queremos y mandamos, que las hayan y sean suyas propias en posesion y propiedad, y que puedan hacer, y hagan de ellas como de cosa propia suya.*" It is impossible to devise any form of words which more clearly conveys a right of property in and to the very substance of a thing.

These again were succeeded by the Ordinances of 1783, or the Mining Ordinances of New Spain. By them the property of the Crown in mines is reaffirmed, in these words: "Mines are the property of my Royal Crown, as well by their nature and origin, as by their reunion, declared in Law IV, Tit. XIII, Book VI of the Nueva Recopilacion." "Without separating them from my Royal patrimony, I grant them to my subjects in property and possession," etc.—*Ord.* 1783, *Tit.* V, *Arts.* 1, 2. *Halleck's Col.* 222.

Whatever may be the true meaning of the regalian right in mines in other European States, there can be no doubt that in Spain the Crown *owned* the mines as a *public property*, and on that basis disposed of them to individuals. There prevailed in Spain and the Indies, then, the *liberté des mines*—the *berg freyheit* of the Germans—which, we are told by Blavier and De Villefosse, above cited, is the most general and extensive exercise of the right reserved by the State to dispose of subterranean property, as a public property, independent of the private ownership of the land which conceals it.

In their opinion in *Chouteau* v. *Melony*, 16 How. 203, the Supreme Court very truly say, that whatever difficulty there may be in ascertaining what estate the subject had in mines, under the

early Ordinances, yet, "as to the right of the Crown there can be no uncertainty;" for, by *Law* 5, *Title* 15, *Part* 2, "*the property of the mines was so vested in the King* that they were held not to pass in a grant of land." And in this case the Court also say of the Ordinances of 1783, that they *granted the mines* of every species of metals to all the subjects of the King's dominions—that the mines discovered by Indians were declared to be, in respect to boundaries, on the same footing, without any distinction, as those worked or discovered by Spaniards, and that much care was taken to preserve for the Indians *their property in mines.—XXI Curtis*, 96, 97, 98.

In regard to the *proprietary right* of the Crown of Spain in mines, the Supreme Court attach the same meaning to the regalian right that De Villefosse, Blavier, Cancrin, De Fooz, Rey, and other eminent civilians do.

The regalian right over mines in France was variously exercised under the old monarchy. In 1791, the whole subject of mining legislation was fully discussed in the Constituent Assembly, and the debate on it was very earnest and able. I believe it was in this discussion that Mirabeau made his last speech. The law passed on the twenty-eighth July, 1791; but it turned out in practice to be very defective, as it gave nothing more than a license to mine, and did not confer a right of property in the mine, and was repealed by the celebrated law of the twenty-first April, 1810, which has continued in force to this day. I shall refer to it a little further on.

I now proceed to point out some of the particulars in which the laws relating to property in minerals differ from those relating to property in the surface, or soil.

The two sets of legal provisions designed to carry out the policy of a State in regard to these two species of property, the surface and the minerals, will be found in all codes to differ in two important respects: *first*, in what shall constitute the consideration for the grant, advanced by the individual to the Prince or State, or to whatever person, natural or artificial, is by theory of law the source of title; and *secondly*, in the terms and conditions imposed on the

grantee, which enforce the policy of the Government with respect to the obligations which the grantee incurs to the State by the ownership of such property. The least reflection will convince us that these differences are not arbitrary, but are the result of reason and necessity, and are grounded in the essential qualities of the things to which they relate.

The great consideration recognized in all mining laws, as that which entitles an individual to a grant of a mine, is DISCOVERY. This results from the scarcity of the more valuable minerals, and from the careful concealment which Nature practices in placing them in localities remote from those which she has assigned to man for his habitation and support; in disguising them by mixture or combination with other substances, and in burying them from sight in the bosom of the earth.

"*Metal*," says Solorzano, "is a Greek word; and some say it is taken from a verb in the same language, which signifies to seek, or search for." (*Pol. Ind. Lib.* 6, *Ch.* 1, *No.* 15.) He, therefore, who discovers a mine, is practically the creator of so much wealth as it contains; and to that extent he enriches the State. "If the inventors of arts tending to the common benefit of society," says Gamboa, "are justly entitled to rewards, the discoverers of mines, the precious metals produced from which are the mainspring of the arts and the animating spirit of commerce, are still more proper objects of such encouragement. For rewards so bestowed, besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the State mainly depends." —1 *Heath. Gam.* 259.

Title VI of the *Ordinanzas de Mineria*, which treats of the modes of acquiring mines, says in its first article: "As it is very just and proper to reward with particularity and distinction those who dedicate themselves to the discovery of new mineral places, and metallic veins which exist in them, in proportion to the merit, importance and utility of such discovery, I order and command that the discoverers of one or more mineral hills absolutely new, in which there is no mine or trial pit open, may acquire in the principal vein which they may select as much as three pertenencias, continuous or uninterrupted, according to the measurement which hereinafter

shall be prescribed; and that, if they may have discovered more veins, they may have one pertenencia in each vein."

The principle that discovery is the valuable consideration for a grant of a mine, is recognized throughout all the laws of Spain relating to the acquisition by an individual of a right of property in mines. In proof of which, I refer to the following laws and ordinances:

1. The law of 1387, Lib. IX, Tit. XVIII, l. 2, Nov. Recop. —Halleck's Col. 5.
2. Law tenth January, 1559, Lib. 9, Tit. 18, l. 3, Nov. Recop. —Halleck's Col. 9.
3. Ordinanzas 1563, Arts. 1, 21, 22; Lib. 6, Tit. 13, l. 5, Recop. de Castilla.—Halleck's Col. 17, 24, 25.
4. Ordinanzas 1584, Arts. 2, 17, 22, 23, 31; Lib. 9, Tit. 18, l. 4, Nov. Recop.—Halleck's Col. pp. 70, 76, 78, 79, 84.
5. Lib. 4, Tit. 19, l. 1, Recop. de Indias.—Halleck's Col. 130.
6. Lib. 4, Tit. 19, l. 3, Recop. de Indias.—Halleck's Col. 132.
7. Lib. 4, Tit. 19, l. 4, Recop. de Indias.—Halleck's Col. 132.
8. Lib. 4, Tit. 19, l. 15, Recop. de Indias.—Halleck's Col. 139.
9. Lib. 8, Tit. 11, l. 1, Recop. de Indias.—Halleck's Col. 164.
10. Ordinanzas de Mineria, 1783; Tit. 6, Art. 1.—Halleck's Col. 223.
11. Decree of twenty-sixth January, 1811, of Cortez of Spain. —Halleck's Col. 382.

I will not, at this place, cite the laws and decrees of the Mexican Government relating to the discovery of quicksilver mines. They are so numerous and important that they deserve to be treated in more immediate connection with the case than these general remarks will permit.

Invention or *finding*, which Sala says is one species of occupation, is declared by him to be the manner in which mines are acquired, when absolutely new mineral places are discovered, or unknown veins in known mineral hills. To the discoverer of the first, three pertenencias are granted by the Ordinances, and to the discoverer of the last, two. But he who discovers a new mine, in a known vein, is not considered a finder (*Inventor*). Denouncers of abandoned mines, he says, may be regarded us occupiers. And he adds, there are therefore two modes of acquiring mines; the one being

discovery, or finding, the other, denouncement or occupation.—*Sala Meji.* 58.

Discovery, as a source of title under the Spanish law, is further illustrated in the finding of treasure, whether of gold, silver, or precious stones; one-fifth going to the treasury, and the remainder to the discoverer.—2 *Sala Meji.* 58.

The right of a discoverer of a mine to have the preference in the concession, is recognized in the mining laws of nearly every country in Europe. In his work on Mining Laws, Delebecque says: "We have seen that Bohemia has been regarded as the country, in Germany, where mines were first worked. It may also be considered as the cradle of jurisprudence on the subject. A confirmation of the customs of Iglau, in Moravia, is cited as the most ancient legislative monument. It is by the King of Bohemia, dated in 1248, and has the title *Jus. Municipale et Montanum Iglavense.* In 1295 appeared the *Constituciones Juris Metallici Wenceslai regis.* They were followed by some other laws. Finally, in 1548 Ferdinand, King of the Romans, published the famous ordinance of Joachimstal, which is generally regarded as the basis of metallic law in Europe." The first article of the Ordinance of Joachimstal says: "It is permitted every miner to dig in any ground in search of metals, veins, lodes and beds, without hindrance from the lord and the proprietor of the land. He who opens a vein shall be regarded as the discoverer, and have certain rights in it—that is to say, the right to receive a part of the same vein; the other parts of the vein may be granted to the first who may request a concession of them. The discoverer, besides, may ask for them for himself.—1 *Delebecque Legis. des Mines,* 39.

The first article of the famous Ordinance of Joachimstal, the basis of metallic law in Europe, begins by giving a general right of search, and by offering in reward for discovery a grant of the mine to the discoverer.

In Hungary, in Saxony, and in Germany generally, the same system prevails.—*Delebecque Leg. des Mines, secs.* 53, 67, 83, 154, 225; *Blavier Jurisp. des Mines en Allemagne, tome* 1, *p.* 34, *et seq.*

Circumstances rarely permit discovery to be viewed as a valuable consideration in the distribution of the soil or surface of a country

among individuals. It applies rather to the finding of new countries, and is regarded as a source of title to the nation by whose citizens they are discovered. In the case of *Johnson* v. *McIntosh*, it is laid down by Chief Justice Marshall, that discovery is the original foundation of titles to land on the American continent, as between the different European nations by whom conquests and settlements were made.—8 *Wheat.* 573.

The discovery made, then occupation, use, cultivation, all that is understood by the comprehensive term SETTLEMENT, comes into play, as the grand source of valuable consideration, Such is the consideration which underlies the preëmption system of the United States. It is founded in reason, and in the nature of things. Hence, the individual who advances to the State such consideration, has a strong position in law, and is the peculiar favorite of equity. The truth of this assertion is copiously illustrated in the legislation of Congress, and in the decisions of the Supreme Court, in reference to land claims in Louisiana and Florida, derived from the old governments of those countries. The legislation of Congress has been directed solely to the recognition of antecedent rights; and has been careful not to give any new ones. (U. S. *v.* Reynes, 9 How. 127.) Therefore, all the principles of decision, established by law, are based on the relation between the claimants and the old governments, and it is only the application of such principles to individual cases that we find in the judgments and opinions of the Supreme Court. In its broadest sense, and most remote consequences, *settlement under contract* is considered by Congress and the Supreme Court, as the valuable consideration given by the individual to the State, which so affects the conscience of the latter, that in good faith it cannot withhold title. This principle underlies all the legislation of Congress, and all the decisions of the Supreme Court on this subject.

The full force and true merit of discovery, viewed as a valuable consideration given by the individual to the State, is recognized by the Federal government in its legislation on the guano islands. At the discretion of the President, such guano islands as are discovered by citizens of the United States may be considered as appertaining to the United States; and the discoverer may be allowed at the pleasure of Congress the exclusive right of occupying such island

for the purpose of obtaining guano. (*Brightly's Dig.* 301.) Discovery, in this law, is regarded not only as the foundation of the nation's right of sovereignty and jurisdiction over the islands, but also as a valuable and sufficient consideration for the transfer by the nation to the individual discoverer of the proprietary interest in the material which alone is supposed to give the least value to such islands.

Between the discovery of a mine, and the invention of a useful machine, there is a striking analogy, both as respects the benefit they confer on the community, and the right to their fruits which accrues to the discoverer and inventor. The right of property in the inventor is acknowledged and protected by the laws of the United States. Gamboa, who represented Spanish thought on this subject, and who wrote in the spirit of the law by which this case is to be decided, was of the opinion that the discoverers of mines are still more worthy of reward than the inventors of useful arts.

If it is true that the land system of the United States is the best which any nation has ever adopted to secure the speedy and thorough settlement of vast unoccupied tracts of land, it is equally true that the mining laws of Spain, which are believed to have reached their greatest perfection in the Ordinances of 1783, are certainly as good as any that were ever framed to promote the discovery of mines, and the full and rapid development of the mineral resources of a country. D. Lucas Alaman, in his history of Mexico, Vol. I, p. 61, says: "The Ordinances which were framed and published on the 22d of May, 1783, proposed by the Tribunal, and grounded upon what Gamboa had said in his Commentaries on ancient Ordinances, are a model of prudence and knowledge, and a glorious monument of the wisdom of Velasquez, and of the Minister D. Jose Galvez, at one time Visitor of New Spain, and afterwards General Minister of the Indies, with the title of Marquis of Sonora." In the land system of the United States, and in the mining laws of Spain, then, we may be said to have examples of the most perfect legal provisions for carrying out the true policy of States in reference to the acquisition, use, and disposal by individuals of the two species of things which compose the earth's substance, and which are the foundations respectively of most of what is called wealth. In the first of these, the great, leading, valuable consideration which the

State requires from the individual, is *settlement*; in the second, it is *discovery*. In both, reason and truth have been consulted. Indeed, these systems are founded in necessity, and grow out of the essential qualities of the things on which they are designed to operate.

The experience of more than half a century has exhibited to us the value of our land system, and rendered us familiar with its sound theory and great results. We know the system thoroughly in all its parts and workings. We appreciate fully the magnitude of the objects it proposes to accomplish; the wisdom of the means it employs to secure them; and the grandeur of the results it has successfully achieved. The system has attained all its ends, and in fact, exceeded the most sanguine expectation of its founders. For it has created nations, and untold wealth, within a period so marvelously short, that the world is astonished at our mighty progress.

But to any system of law which, regarding minerals as a species of property distinct from the surface or soil, and as the greatest source of national wealth, designs so to regulate their acquisition, use and disposition by individuals, as best to promote their discovery and development, the people of the United States, save only in California, Oregon and Nevada, are utter strangers. On the other hand, it was with laws having precisely these objects, that the Spanish mind was most familiar. "Spain, by a very singular fatality," says Gibbon, "was the Peru and Mexico of the old world. The discovery of this rich western continent by the Phœnicians, and the oppression of the simple natives, who were compelled to labor in their own mines for the benefit of strangers, forms an exact type of the more recent history of Spanish America. The Phœnicians were acquainted only with the sea-coast of Spain; avarice, as well as ambition, carried the arms of Rome and Carthage into the heart of the country, and almost every part of the soil was found pregnant with copper, silver and gold. Mention is made of a mine near Carthagena, which yielded every day twenty-five thousand drachms of silver, or about £300,000 a year. Twenty thousand pounds weight of gold was annually received from the Province of Asturia, Gallicia and Lusitania."—1 *Bohn's Gib.*, 204.

In treating of the mineral wealth of Spain, Gamboa says: "In the history of the Maccabees, where the great power of the Romans is described, it is mentioned as one of their mighty acts in Spain, that

they had made themselves masters of the rich ores of gold and silver. From no other country (according to Fray Juan de la Puente, who cites Solinus, Pliny, Lucius Florus, Strabo, Posidonius, Polybius, Aristotle, Diodorus Siculus, Herodotus, and other Greek and Latin authors) could so great an abundance of these rich ores be produced." * * * "It is, however, quite enough to look at our laws and ordinances, by which it appears, that the reason of Philip II annexing the mines to the royal patrimony was, that it had been understood from of old, that they were very rich and abundant." * * * "The practice of this important branch of industry first fell into disuse, either from the continual exercise of arms, or from the difficulties of mining, and the poorness of the ore; and then, the discovery of the New World supervening, Spain became altogether neglected, and her mines were filled in and lost." And in another place, speaking of the trade of Spain, he says, "All which profits have their source in the specie of the Indies, and principally in the fourteen millions of hard dollars, annually coined in the great mint at Mexico. No monarchy but our own is adorned with grandeur like this; much less can any other sovereign boast of so great an extent of empire as ours; sincerely do I wish it could be peopled with a greater number of Spaniards, to bring into civilization the large space yet remaining unclaimed in that vast continent." * * * "The trade of Spain, then, ultimately sweeps off the whole of the rich produce of the mines, but not till it has served to support numerous villages, towns and cities, extended over a vast space from east to west, and from north to south, exclusive of the missions and remote posts. And if, notwithstanding all this, the Spaniards are to be called the Indians of other nations, be it so; but let them not be deterred by the apprehension of being visited by this appellation, from fervently praying for many future Columbuses, Cortezes and Pizarros, to exalt the lustre of their national fame."—*Gam. Com. chap. III, Nos.* 7, 8, 12, 18, 19.

Treating of the precious metals derived by Spain from the mines in America, as connected with the wealth and grandeur of the Empire, Solorzano remarks: "Now as I am about printing this, there has come into my hands a sensible paper, written as it seems by a minister or secretary of the King of Denmark, in which, answering some unfounded reasons with which the French party in

the present Congress of Munster attempts to deprecate the glory and power of Spain, and to prove that it is about to fall, says: It is such that there may be applied to it the words of the poet respecting Niobe: *Mayor soi que los daños de fortuna, pues aunque quite mucho, mas me queda.* And this was soon proven, for the news reached the same Congress of the arrival of the galleons, which brought to our king more money than the revenues of France and Sweden, and all their kingdoms would amount to in ten years! But why are particular proofs required in a matter so notorious, which all the kingdoms of Europe, and even of Asia confess, and have generally felt? for, as Father Escribano says, if anything proves such wealth, it is the various tricks to which they have resorted to get it away from us: a point in which the learned jurisconsult Alonzo Carranza, blaming in this respect our want of care, and proposing means to remedy it, affirms, that since the Indies were discovered, there have left Spain more than fifteen hundred millions, without the smallest part returning: a thing greatly to be regretted; for, as I have said in another place, we ought to apply all our study and genius to bring about the opposite result. And it is well known, and France even boasts of it, that she has been totally wanting in these precious metals since the reign of its King Henry IV, who used to say, according to Pedro Mateo and Tomas Lancio, ridiculing our want of care, that he did not require to have them, as the Spaniards were his debtors and tributaries, and that he was not obliged to seek them of us, as we collected and brought to him each year more than four millions."—*Solorzano Pol. Ind. Book VI, Ch. I, Nos.* 12, 13.

It is therefore clear, that whatever in reality may be the effect of great mines of the precious metals on the welfare of States, the Spaniards shared the opinion of mankind from remote antiquity, in regarding them as the greatest source of national wealth, and strength, and grandeur. In connection with this subject, it is worthy of remark that, although the speculations of political economists have recently led to the establishment of many propositions respecting the true elements and sources of the wealth of nations, which, now that they are demonstrated, we wonder should ever have been doubted, yet in the debates of statesmen, and in the discussions of philosophers respecting them, the source most prolific in fallacies

and errors, the prejudice which served most to obscure the light of truth, was the idea that wealth consisted in the precious metals only, and that legislation should so direct the affairs of trade as to cause the greatest accumulation of gold and silver in a nation. In the preliminary remarks to his work on Political Economy, Mr. Mills, speaking of the Mercantile system, says: "While this system prevailed, it was assumed, either expressly or tacitly, in the whole policy of nations, that wealth consisted solely of money; or of the precious metals, which, when not already in the state of money, are capable of being directly converted into it. According to the doctrines then prevalent, whatever tended to heap up money or bullion in a country, added to its wealth; whatever sent the precious metals out of it, impoverished it." And in another place he remarks, that, although the doctrine that money is synonymous with wealth, seems too preposterous to be thought of as a serious opinion, let no one feel confident that he should have escaped the delusion if he had lived at the time when it prevailed. We can surely pardon the Spaniard, for holding in common with the wisest statesmen and profoundest thinkers in the world, down to the latter part of the last century, the opinion that wealth consisted in the precious metals only; and we can easily perceive how that belief became the guiding thought and animating spirit of legislation respecting the mineral wealth of his country.

I can offer no better illustration of the estimation in which her mineral resources were held by Spain, relative to the surface or soil, than by referring to the remarkable fact that, while the Spanish Codes are filled with ordinances intended to stimulate the discovery of mines, and the development of mineral wealth, yet, with the exception of the laws relating to the establishment of *pueblos*, there was no legal provision for the distribution of *Realengas*, or government lands, among her subjects, although Spain owned in the Americas vast unoccupied tracts of the finest lands in the world.

The mining laws were to Spanish America what the preëmption laws are to ourselves. They contained the system upon which depended the successful development of what was regarded as the greatest element of wealth, both national and individual. Their application, day after day, for centuries, to the practical affairs of mining over the vast regions where they prevailed; the numerous decisions

of courts on questions arising under them; the arguments of counsel and the commentaries of learned and practical men, must have cleared up all obscurities, settled all doubts, and caused them to be thoroughly understood and appreciated, as well in their general principles, as in their numerous and minute details.

The System of the Spanish Mining Laws.

To such an understanding of these laws we must endeavor to arrive. The system of the Spanish mining laws, is very simple and apparent. Its analysis is easily made, by considering what were its intended results, and what the means adopted to bring them about.

The *object* of the various mining ordinances of Spain, was to stimulate and promote to the utmost extent the discovery of mines, and the development of their riches.

The *means* adopted to stimulate *discovery*, was to give to the discoverer the mine he might discover, the State reserving for itself a small part of its products. The means by which the *development* of the riches of discovered mines was secured, consisted in making the continuance of the right of property in the mine dependent on working it, to the extent and in the mode prescribed by law.

It is to these two results, *discovery* and *development*, that the main provisions of the mining laws of Spain, and indeed, of those of all the States of Europe that have such laws, are directed. *Discovery* is the valuable consideration for the grant of the right of property in the first place; *development according to prescribed rules*, the condition of the continuance of that right.

It is with discovery, as the valuable consideration of the grant, that we are concerned just here. So clearly does this principle result from the nature of things, that a man of ordinary intelligence, ignorant of the laws and customs by which the subject has been regulated in the various nations of the earth, would be led to it by reason.

For in the eye of reason, *discovery* is practically and for all the uses of society, *creation*. It finds what was concealed. It makes known what was unknown. It increases the aggregate wealth of

communities, and subjects to the use of man that which, while undiscovered, might as well not have existed.

The System of California Mining Laws.

It is interesting to observe how, by the coöperation of Congress, of the State of California, and of its miners, the *system* of the Spanish Mining Code has been adopted among us. Congress has played a negative part, it is true; but in its careful abstinence from legislation we recognize the great principle, that the system of law for the settlement of unoccupied lands, the great preëmption system of our country, which has built up so many States, is declared by Congress to be unsuitable to the public mineral lands of California. The philosophy of *settlement* does not apply to them. They must be regulated by other principles; they must be brought under another system.

That system, furnished by the miners of California, who alone of all the people of the United States are capable of making one, Congress quietly permits, while the State of California adopts it, legalizes it, enforces it.

The usages and regulations of each mining locality establish the principles and rules by which, according to the laws of this State, all disputes concerning mining claims are to be decided. They determine how the mines are to be acquired, and impose the terms on which their continued enjoyment depends. Thus the miners make their own laws regulating the rights of discoverers, the dimensions of mines, what shall be held a sufficient working, and what an abandonment. They are the real legislators, by whom all the rules which govern the acquisition, the enjoyment, the working, and the forfeiture of mines by individuals, in the richest mining country in the world, have been made for many years. These laws are the basis of title to a property which is distributed among tens of thousands of men, which during the last eleven years has yielded between seven and eight hundred millions of income, and which at this day is as productive as ever.

Such is our system. It is not only an excellent one, in its great principles and general provisions, but the best that can be devised.

Throughout the length and breadth of this land, year after year, in all places and modes of utterance, from the bench and the bar, from all the Departments of our State Government, from the press of the Union, from the halls of Congress, and from the mouths of our countrymen everywhere, have proceeded eulogies on the mining system of California, with whose superb results we challenge the admiration of the world.

The system, in truth, is as near perfection as can be. It has but one fault. It is a vast system of trespass, attended by the spoliation, waste and destruction of the property of the United States. Sanctioned by the laws of this State, and by the principles of natural justice; commended by the moral sense of mankind, by considerations of the soundest policy, and by precedents of tried virtue; fostered by Congressional inaction, and by a sort of lazy, let-alone, unauthentic adoption, as it has been considered: it exists only by the nonfeasance of the President of the United States, who in permitting it, himself violates the law. But when his potent rod, in evil day, waves round this coast, the fortune of every miner will be annihilated, and California will be locked in the stony fetters of a universal injunction.

That the miners of California should have no right to their mines; that the laws of the land should point to their fancied acts of dominion as to the vastest trespass in history, and that Courts of equity should declare them to be acts of waste and spoliation; that the great mining property of California and Nevada should be *holden* of Congressional sloth and Executive nonfeasance; presents a condition of law unknown to any people who have advanced one step out of barbarism, or broken the first link in the chain of absolute slavery. That such things should be, is, as declared by the Legislature of this State, "an outrageous violation of the principles of free government." The basest tenure of the feudal times was not so base as this. The meanest villein, who cringed before his lord in the shadow of the castle wall, might invoke the protection of the law for what was his. But when Mr. Attorney General directs Mr. District Attorney to file his declaration in ejectment, and his bill in chancery, for an injunction against any miner on the public land in California or Nevada, there is no law to protect him, but only revolution and the subversion of law.

Any person in the least familiar with the provisions of the Mining Codes of the various States of Europe, even the most despotic, must perceive the anxious care with which discoveries are encouraged, and how liberally they are rewarded. No Government in Europe, except perhaps some small principalities, monopolizes its minerals. On the contrary, they all grant them to their subjects, whose rights of property are surrounded by every guaranty and safeguard of law. It has been reserved for the Government of the United States to lock up "the all-worshiped ore and precious gems" where nature placed them, and to prohibit its citizens from enjoying and developing the wealth with which a bountiful Providence has endowed the "noble region of the subterranean world."

I beg to be pardoned for this digression.

Never was there in any population a greater proportion of intelligent, honest and practical men, than might be found among the miners of California any time during the last ten years. They were, for the most part, in the vigor of life. The dangers and expenses attending their emigration prove that they must have been among the most resolute and active spirits of the age, whose previous success in life afforded them the means of further enterprise and adventure. They brought with them to California that respect for law and human rights, that facility for acting in masses according to common consent, and that practical acquaintance with the art of legislation, peculiar to a people who have been long experienced in self-government. The legislation of such a class of men, on a subject with which they are engaged as a business, and which they thoroughly understand, even in its most minute details, is certainly entitled to great consideration. In it we may confidently look for sound principles, for fair and useful provisions, and for perfect adaptation to the actual circumstances of the country. Nor will we be disappointed. Their legislation is simple, practical and just. It is founded on certain general principles, which reason and the common sense of mankind recognize as true and equitable. It is made for the masses and secures equality. It gives no privilege where there is not corresponding merit.

I have adverted to the legislation of the miners of California, to the character of our mining population, and to their peculiar fitness for making laws on the subject of mining, with the view of drawing

attention to the fact, that in all the regulations in all the mining localities of this State, without exception, discovery is regarded as the fundamental ground of title—as the valuable consideration, given by the individual to the community, for the right, exclusively to enjoy and freely to dispose of the thing which he has found.

II. The second difference between the two sets of legal provisions relating respectively to the surface and the minerals, will be found *in the terms and conditions imposed on the grantees respectively, by which the policy of the Government, with respect to the obligations which they incur to the State, by the ownership of such property, is declared and enforced.*

I do not propose to enter upon a review of the various burdens and charges imposed by Governments on the owners of the surface or soil of a country. These have varied with the world's epochs; with the internal peculiarities of each country; with the character and habits of surrounding nations; with advancement in civilization; and with the progress of States in the art of government. In all countries not absolutely barbarous, land has entailed on its owners certain peculiar obligations to the State. Perhaps under no other system have such obligations been so strongly marked and defined, so thoroughly incorporated into the very foundations of government, and so rigidly enforced, as under the Feudal system. During the Feudal ages, it has been truly said, man was land. When I say that the Feudal system is the name of that policy which generally prevailed in modern Europe, with regard to the obligation of the individual to the State, resulting from the ownership of the surface or soil, I have given a very fair definition of the system, if not a complete one. This remark is intended to exemplify the great importance of these obligations; to show how closely they bound the individual to the State; with how large an inlet they entered into and formed the reason and system of the laws which determined and moulded the rights of property; how they underlaid the acquisition of property by the individual, and were the very life and soul of its continued enjoyment by him; and how his refusal to abide by and perform the conditions of his grant, in which these obligations were embodied—how even his simple denial of their existence—was attended by a forfeiture of his right of property.

In later days, the purposes which were subserved by the charges imposed on the ownership of the soil, are found to be better answered by taxation. For this reason, the immediate relation between the right of property in the soil and the Government of the State in most countries has ceased. The obligations resulting from the ownership of land are no longer exhibited in manifold personal services. Land no longer sends forth noble, and knight, and esquire, and yeoman, to do its stipulated duty to the State. The owner of land no longer examines his *breve testatum* to see what services he is bound to render his Sovereign in payment of the land he owns, upon which the further enjoyment of his right of property in it depends. Taxation has superseded this clumsy machinery of feudalism, and for all practical purposes has made the ownership of the soil allodial. What remains of *Tenure* in England and the United States, scarcely extends beyond the mere theory of the deraignment of title to land from some remote *Conquestor*, real or imaginary, under whom it is still considered as holden.

For this reason, the continual dependence of the right of property in the soil on the performance by its owner of the conditions upon which he received it from the State, and its continual liability to forfeiture at any moment for breach of those conditions, which are two essential modifications of the right of property under the feudal law, have in a great measure been lost sight of, and have long since ceased to have any practical operation or value. Indeed, so entirely were these principles overlooked by Judge Thompson, in examining the question of jurisdiction, that he could not bring his mind to conceive how the right to property in *land* could coexist with such terms and conditions as were imposed by the laws of Spain on the owners of *mines*. These terms and conditions, be it observed, were nevertheless very appropriate, very simple, and very easily complied with. They accord in all respects with the nature of such property. They stimulate its productive enjoyment by the owner, and help him to all of its uses, instead of preventing or embarrassing his operations. They are not so numerous, or complicated, or onerous, as the conditions upon which, by the feudal law, the vassals of the Crown held their great estates. For a starting point, take Doomsday Book, and in continuation Dugdale's Peerage, and you will find in *grants* and *forfeitures* a history of all the land in England. Fol-

low up the titles of the Northumberlands, of the Arundels, and the Norfolks, and you will find them full of wars, attainders, beheadings, *forfeitures*. There is nothing which so repeatedly suggests itself to the reader of feudal history, as the precarious tenure of life and land in those stern times. If, as Judge Thompson argues, there be in *land* the essential quality that the right of property in it cannot be held by a precarious tenure; and if, pursuing his logic, whatever is held by a precarious tenure cannot, for the reason that it is so held, be *land*—I can prove by Hume's History that the law of England does not recognize any such subject of property as *land*.

While speaking of the system of the Spanish mining laws, I said its objects are two: *first*, the discovery of mines; *secondly*, their development. That *discovery* is the valuable consideration for the grant of the right of property in the first place; and *development according to prescribed rules* the condition of the continuance of that right.

I am now attempting to show the difference between the two codes of laws which determine respectively the right of property in the surface, and the right of property in minerals, in regard to the conditions upon which the continued existence of those rights depend.

The nature of the surface or soil is such, as respects its uses and the means by which it may be made productive, as not to require legal supervision or direction. Even in feudal times, the obligations of this species of property to the State were not imposed with a view to its development or increased productiveness. For the uses of the soil are so manifold, its conveniences so great, its products so certain, and its cultivation so simple and easy a task, that it has never been deemed the policy of any State to insert in grants of such property conditions of development, beyond such as will answer the temporary purpose of securing its settlement and occupation in the first instance by the grantee. Therefore a feud, which was a clumsy business transaction between the King and his subjects—a continuing barter between the Crown and the vassal of land for service—finds all its purposes much better answered by taxation.

Not so with mineral property, for obvious reasons.

To stimulate the search after mines, discovery is rewarded by title.

But what benefit to the Royal treasury would be the discovery,

unless the proper officer of the Crown were notified of it. For if it were worked clandestinely, the King would be defrauded of his prescribed portion of the metals.

For this reason, the discoverer is required to make known his discovery to the officer designated by law for that purpose.

This notification of the fact of discovery is called the registry of a mine.

Again, of what benefit to the Royal treasury, or to the State at large, would be mere discovery and registry, unless they were followed by the development of the mine.

Hence development, the great aim and end of all systems of mining law, is necessarily and justly made a condition upon which the continuance of title depends.

But if development be made a condition of the grant, it follows as a matter of necessity, that either the grant or the law must define its minimum, and establish the rules by which it shall be conducted.

And it follows further, that the penalty of forfeiture for failing to comply with the conditions of the grant relating to the development of the mine is a provision due to the State, essential to its mining system, and not unjust to the discoverer.

Provisions of the Ordinances of 1783 *respecting development and forfeiture.*

Let us now examine the provisions of the Ordinances of 1783, which fix the *minimum*, and prescribe the mode of development, and impose the penalty for its enforcement.

And first *as to the minimum of development*. This is specified in Tit. IX, Arts. 13, 14, *Ord. de Min.*—Halleck's Col., 243, which as they set forth their own reasons, I will quote :—

"Art. 13. As mines require to be worked continually and incessantly in order to procure their metals, and as they require in them works and operations which can be executed only in a long time, and as their reëstablishment, if their working be suspended and interrupted, will cost as much as their original undertaking ; therefore, to obviate this inconvenience, and also to prevent any owners of mines, who cannot or will not work them, from keeping them without use, and for a long time impeding, by a pretended working, the

real and effective labor which others might bestow upon them, I order and command, that any one who shall, for four consecutive months, fail to work a mine with four operatives, regularly employed, and occupied in some interior or exterior work of real utility and advantage, shall thereby forfeit the right which he may have to the mine, and it shall belong to the denouncer who proves its desertion, according to the provisions of Title VI."

"ART. 14. Experience having shown that the provisions of the foregoing article have been eluded by many owners of mines, by the artful and fraudulent means of having them worked some days of every four months, keeping them in this manner many years in possession, I order also, that whoever shall fail to work his mine, in the manner prescribed in said article, for eight months in a year, reckoning from the day of his possession, even though the said eight months should be interrupted by some days or weeks of labor, shall thereby forfeit such mine, and it may be adjudicated to the first person who denounces it, and proves the second species of desertion, unless, for this and for the one mentioned in the preceding article, there have occurred causes of pestilence, famine, or war, in the place itself of mines, or within twenty leagues thereof."

Next, *as to the rules according to which the development is to be conducted.* These are to be found in Tit. IX, Arts. 1 to 12 inclusive. The Title has the caption, *of the manner in which mines ought to be worked, secured and protected.* The first article gives a concise statement of some of the dangers and difficulties in the way of working mines, which render necessary the careful supervision of the Government. As these are *reasons*, and therefore strengthen my argument, I will quote the article :—

"ART. 1. It being of the greatest importance that the lives of the workmen, and other persons who are obliged continually to enter and go out of the subterranean works of mines, should not be endangered, and that the mines should be kept in a state of security and convenience necessary to the progress of their works, even those which their first owners abandon as useless, or because they are unable to carry them on; and it being impossible to establish any general and absolute rule on the subject, because the variety of circumstances of each mine, in the greater or less firmness, tenacity and cohesiveness of the sides, and of the substance itself

of the vein, its greater or less inclination, the width and depth of its workings, lead to much diversity in the dimensions and number of the pillars, arches, beams, cross-beams, and other supports which must be left or constructed in order to sustain the sides; and also, in the arrangement of the works required for proper ventilation, and for the convenient removal of the substances which are to be taken out of the mines, all of which cannot be effected without true practical skill and science in the working of mines—I order and command as follows:—

"ART. 2. It shall not be permitted to any one to work mines without the direction and continual assistance of one of the intelligent and practical experts who, in New Spain, are called *Mineros* or *Guardaminas*, who must be examined, licensed and approved by one of the Professors of Mining, which each *Real* or *Assiento* must have, as will be mentioned hereafter."

The other articles referred to go into details where it is useless to follow them.

I will now consider the *penalties imposed for the enforcement of the rules relating to the extent and mode of development.*

These penalties are fines, forfeitures, imprisonment and banishment—I propose to treat of *forfeitures* only.

By these Ordinances (unlike those of 1584) the penalty of forfeiture is not wantonly or capriciously imposed, but only in extreme cases, and when it is essential to the great ends of the law; and even then, certain equitable considerations will justify courts in remitting the penalty.

The causes of forfeiture are the following:

1st. If any one shall for four consecutive months fail to work a mine with four operatives, regularly employed and occupied, in some exterior or interior work of real utility, he shall thereby *ipso facto* forfeit the right which he may have to the mine, and it shall belong to the denouncer who shall prove its desertion, according to the provisions of Title VI.

With this minimum of development surely no mine-owner can find fault. To be required to keep four laborers constantly employed for as much as eight months in the year in some useful work, in or about a mine, is reasonable enough. The smallness, not the magnitude, of this minimum of development surprises us. But moderate

as this condition is, miners who fail in performing it, because they are engaged in soliciting supplies, or for the want of operatives, or necessary provisions, or for other just causes, which, combined with their former merit, render them worthy of some equitable consideration, may plead these facts against the forfeiture.—*Ord. de Min., Tit. IX, Arts.* 13, 14, 15.

The benignity of these provisions is certainly more remarkable than their rigor.

2d. The entire removal, or even the weakening and diminishing of the pillars, arches and necessary supports of a mine, is made a criminal offense on the part of every laborer, searcher or tester who shall commit the act, and also on the part of the mine-keeper who shall permit it, punishable by ten years' imprisonment. And if the mine-owner does it or permits it, he *forfeits* the mine, and also half his property, and is forever excluded from any employment in mining.—*Ord de Min., Tit. IX, Art.* 7.

The rigor of this provision was evidently dictated by regard for the safety of persons engaged in working in mines, and the punishment was doubtless proportioned to the temptation to remove the supports of a mine when they consisted of rich ores. This provision with all its harshness is not too severe. It punishes a great crime, and is analogous to the provisions of various criminal codes in regard to steamboat boilers.

3d. It is made the duty of certain officers to visit all the mines within their jurisdiction once in six months or once in a year, where they cannot do it oftener; and if they find that the mines are not worked as required by the Ordinances, or with a due regard to their security and preservation, they shall immediately adopt measures to have the defect remedied and amended within a reasonable time. And if the mine-owner shall fail to follow their directions, or if the same offense occur again, "they will impose upon the offenders the corresponding penalties, increasing and multiplying them even to the forfeiture of the mine."—*Ord. de Min., Tit. IX, Art.* 10.

The object of this article is to provide for certain contingencies which the Ordinances could not foresee and guard against. Each mine has its peculiarities, and requires to be worked its own way. What that way is, can be decided by inspection only. It was to

enforce such a working of each particular mine as may be essential to its security and preservation, and to the safety of the persons employed in it, (all its circumstances considered) that this Article was inserted. As it was impossible for the Ordinances to do more than to prescribe general rules, it became necessary to provide the means of ascertaining, and enforcing, what the exigency of each particular case might require. This provision, like the others we have named, is not only reasonable, but necessary.

The foregoing are all the causes of forfeiture connected with the development of mines.

There are two, and only two, other causes of forfeiture prescribed by the Ordinances of 1783—which are the following:

4th. Where the denouncer, having entered into a contract of partnership before the denouncement, denounces the mine in his own name alone. In this case he forfeits his share.

This provision was intended for the security of the partners of the denouncer, to whom his share would go, as a punishment for his having attempted to deprive them of their rights. It supposes that the denouncement is made in bad faith to the parties.—1 *Gamboa*, 176. *Ord. de Min., Tit. VII, Art.* 6.

5th. For failure by secular ecclesiastics, to sell the mines which by inheritance or by any other title may devolve on them, within a given time, they being prohibited to hold or work mines.—*Tit. XII, Art.* 2, *Hallock's Col.*, 231.

The subordination of the mine-owner's title to the foregoing requirements of the law, was rendered necessary by great considerations of public convenience. The provisions which refer directly to development are too clearly wise and just to require comment. Those which relate more immediately to the mode of conducting excavations, or to the plan of working, while they are intended to insure the security and preservation of the mine, in which both the King and the public had an interest, are designed also for the safety of the laborers, and in this respect may be considered police regulations.

If such subordination of property to the general welfare appears to us to be just and wise, in these days, when science and art have come to so great perfection, and are so widely diffused among the masses, how much more necessary must they have been in the last century, and in New Spain.

I think the foregoing considerations are quite sufficient to show that the mine-owner's estate, under the laws of Spain, was not held by a slight and uncertain tenure; but on the contrary, that it was a perfectly well-defined right of property, in and to a perfectly well-defined subject of property, held upon perfectly well-defined conditions; that these conditions were few, simple, and easily complied with; that instead of embarrassing or clogging the right of property, they were intended for the security of the mine, and for the safety of life and limb; that instead of depriving the owner of any of the benefits of his mine, or restricting him in the use of it, their intent was, and such also was their effect, to stimulate him to its use, and to conduct him to its greatest enjoyment, by subjecting his operations to the guidance and direction of art.

In other words, that the subordination of the right of property to State administration was as slight as the peculiar nature of the subject of that right would admit of; was simple in its form, wise in its measures, mild in its penalties, and just in its objects.

That there was nothing in this subordination inconsistent with the right of property in *land*, is too plain to need illustration.

The foregoing Principles illustrated by the Mining Law of France, of the 21st of April, 1810.

On no matter of Jurisprudence, perhaps, have the jurists of France been more earnestly engaged, in this century, than on their mining laws.

One great fault in the law of 1791 was, that instead of granting a right of property in a mine, it conferred nothing more than a license to work. The concession of a mine before the law of 1810, was not an immovable property; it was a kind of business, subject to patent.—2 *Rey Prop. des Mines*, 16.

To correct this fault and others, the *projet* of a Mining Law was introduced into the Council of State on the twenty-second of March, 1806, and was discussed from time to time, in its various sessions, until the twentieth of February, 1810, when the Emperor ordered that the *projet*, as adopted, be communicated to the Committee on Internal Affairs of the Legislative body. After conferences between the members of this Committee, presided over by Count Stanislaus de Girar-

din, and those of the Council of State, presided over by Count Regnault de Saint Jean D'Angéley, finally, on the 21st of April, 1810, the law passed by a vote of two hundred and thirty-two against eleven.

"This law," says M. Dupont, in the introduction to his work on Mining Jurisprudence, "organized in France the right of property in mines. It has been, and remains, one of the glories of the Imperial Government. Fourcroy, Cambacérés, Regnault de Saint Jean D'Angély, took an active part in the memorable discussions which distinguished the elaboration of this important law in the Council of State. Napoleon himself often joined in the discussion, and he impressed upon the work of his Council the stamp of his practical mind and administrative genius." *Dupont Jurisp. des Mines; Introduction; Locré Conférence, Vol. 9, p. 107, etc.*

At the sitting of the Council of State, held at the Tuilleries on the 22d of March, 1806, Napoleon, presiding, said:

"That although mines, like other things, are susceptible of all the rights which ownership confers, nevertheless they are not property of the same nature as the surface of the soil, and the products thereof.

"That class of property must be governed by particular laws, and those only may pretend to their ownership to whom the law delegates that quality. But in other respects, the ownership of mines must fall entirely under the common law. It is necessary that the owner should be able to sell them, give them away, and mortgage them, according to the same rules which govern the alienation or mortgage of a farm, a house, and, in a word, of any immovable property whatsoever; it is necessary, also, that the litigation which may arise in respect to them should be referred to the tribunals.

"As to the existing grantees, in order to place them within the general system, it is necessary to declare them owners by an indefeasible title. The Government shall, under such laws, grant the mines not yet disposed of, under the obligation that they shall be properly worked."—*Locré Conférence*, 143.

"In the sitting of the 8th of April, 1809, Count Ségur said, that among all nations, mines are regarded as public property. It

is for that reason, that in all grants giving the right to work them, the State always reserves a rent for itself.—*Locré*, 161.

At the sitting of the Council of State, on the eighteenth of November, 1809, Napoleon said: "It should be settled as a principle, that mines are property, the ownership of which is acquired only by grant.

"The Arch Chancellor would prefer that the owner of the surface should be declared owner of the mine, under the obligation of working it."

The Emperor said, "that these ideas were too metaphysical. Moreover, in practice these two systems have the same results, since, by the grant the rights of the proprietors are secured.

"Besides, there is a great interest to impress on mines the stamp of landed property. If they were only enjoyed by license to work them, (*concesion*) giving to that word its ordinary acceptation, it would only be necessary to repeal the decree which grants the favor, to despoil those engaged in mining enterprises.

"On the contrary, if *they are property*, they become inviolable. Napoleon himself, with the numerous armies at his disposal, could not take possession of a field, because, to violate the right of property in one instance, is to violate it in all.

"The secret here, then, is to make mines *actual property*, and thereby to render them *sacred* in law and in fact. We must look upon mines as things not yet born, which exist only from the moment they are liberated from the ownership of the surface, and which at that very moment became property by the effect of the grant; from that moment, also, they are ranked with other property."—*Locré*, 343, *et seq.*

The penalty of forfeiture, as the means of enforcing the development of mines, is not peculiar to the Spanish law. I believe it is a common feature in all the European mining codes. The history of this feature of the French code is very interesting. Pending the debates on the law of the twenty-first of April, 1810, a particular chapter had been devoted to the forfeiture of the mine in case of abandonment; "but," says Locré, in his report of those debates, p. 518, "Napoleon, carrying out his theory, and desiring that his assimilation of the ownership of mines with the ownership of other property should be complete, rejected the suggestions persented to him, to the effect that the right to misuse, which belongs to the owner of the soil,

should not be allowed in respect to mines, to the extent of permitting these sources of national wealth to be exhausted; and, consequently, he caused the title *of the vacancy and abandonment of mines* to be suppressed."

Pursuing the history of that title, M. Dupont says:

"There was retained only Article 49, of the law of 1810, which recognizes, in a general manner, the right of the Government *to legislate as may become expedient*, in cases where the working of a mine is restricted, or suspended in such a way as to endanger public safety, or the necessities of the consumers.

"However, the legislators were not long before they acknowledged that the Government should be empowered to prevent effectively the decay of the mineral wealth by the inactivity of a grantee. Immediately after the twenty-second of June, 1812, the Secretary of the Interior in possession of a report from the Minister, presented to the Council of State a *projet* of a decree relative to the abandonment of mines, by express declaration or by cessation of labor.

"By the provisions of this *projet*, the grantee of a mine which had not been worked for a year, was to be notified by the Minister of the Interior to resume operations within six months, and in case of noncompliance, the mines should be sold judicially.—*Arts.* 9, 10 *and* 11 *of projet.*

"Observations on that *projet* were made by Count Corvetto. Afterwards, military and political events caused everything to be forgotten for awhile; at last, on the twenty-third of November, 1813, the Section of the Interior presented a new draft, which was converted into a *projet* of a law, which maintained the right of forfeiture in regard to the grantees of unworked mines.

"That *projet* of a law was to have been presented to the Legistive body, 'but soon thereafter,' said Locré, 'nothing could be thought of but the defense of the territory; and the fall of Napoleon, which immediately followed, put a stop to everything.

"Matters rested thus until the twenty-seventh of April, 1838, when a law passed on the subject of draining mines.

"Articles 1, 2, 3, 4 and 5 of the law, empower the Government to compel the grantees of mines threatened with overflow, to execute together, and at their expense, the necessary works to keep down the waters; the 6th Article arms the Government with the right of

forfeiture against disobedient grantees. But this is not all—*the 10th Article of the same law, establishes formally on behalf of the Government, and according to the forms prescribed by Art. 6, the right of forfeiture against the grantees of mines whose works are restricted, or suspended, without lawful cause, so as to endanger public safety or the wants of consumers.*

"Thus the law of the twenty-seventh of April, 1838, supplies the deficiency of the law of 1810, in regard to unworked mines, which had been perceived since 1812 by the Imperial Council of State." —1 *Dupont Jurisp. des Mines*, 67 *and seq.*

Strong as was the desire of Napoleon to assimilate estates in mines to those of the surface, he was forced to acknowledge that the penalty of forfeiture was essential to secure the development of mineral wealth, and the observance of the conditions of the grant. He wished, at first, not to extend the administrative *surveillance* over mines, beyond such control as mere police regulations might demand, but it was soon ascertained that something more was required; hence, he was obliged to have recourse to the penalty of forfeiture, as an administrative measure of coercion—the *esprit* of ownership not proving sufficient, as at one time he thought it would be, to ensure the highest development of mineral wealth.

On presenting the *projet* of the law of twenty-first of April, 1810, thus carefully prepared in the Council of State, to the Legislative body, Count Saint Jean D'Angély, as the Commissary of the Government, set forth some of the reasons upon which it was based.

He said:

"The Council (of State) was led to conform to the principle of an indefeasible estate in mines in the hands of the grantee; to give them the character of private estates; to secure the preservation, the active operation, and the success of the different enterprises.

"Mines must cease to be *precarious*, *uncertain*, and *undefined* property. They should be turned into property to which all the definitions of the *Code Napoloen* can be applied.

"It is necessary that these great masses of wealth, to be found under numerous subdivisions of the surface of the land, instead of remaining divided like the surface, should, through the intervention of the Government, by virtue of a solemn act, become a whole, the

extent of which shall be settled, become distinct from the soil, and somewhat a particular creation.

"Henceforward mines shall be perpetual, disposable, and transmissible property. The sale, the donation, the inheritance of that considerable part of wealth, which is at the same time landed and commercial, become subject to rules common to all property.

"The law on mining looking to the common law for all the rules regulating private interests, we are disembarrassed in drafting it of all the difficulties which numerous exceptions presented. That principle once discovered and established, consequences flow therefrom without effort, and the whole system of the law presents itself with clearness.

"Granted by an act deliberated in the Council of States, mines shall be, as I have said, new immovable property, impressed with all the inviolability—all the sanctity—of the old ones. Everything used in working them shall form part of the realty itself.

"The act of concession gives to the indicated grantee the property free, and if I can so express myself, virgin.

"The working of mines, considered up to this time as a commercial enterprise, was subject to patents. No rent was due to the State according to the law of 1791.

"*From this day, grants of mines become private hereditary property, protected by the common law, and the expropriation of which the tribunals alone can pronounce.*"

In the sitting of the twenty-first of April, 1810, Count Stanislas de Girardin, President of the Committee of the Interior of the Legislative body, of which he was the organ, and reporter of the *projet* of the law, in his turn said:

"The opinion of those who desired to establish the principle that mines form a part of the property of the owner of the soil, was victoriously refuted by Mirabeau.

"To throw light on the subject under discussion, it is necessary, first of all, to have a very clear conception of what a mine is, and to have a plan of it, if we may so say, in the mind's eye.

"Mines are beds of combustible matter, or veins of metallic substances, which sometimes extend several *myriamètres*, and which sink in various manners into the bosom of the earth to infinite depths.

"To work a mine advantageously and in a regular and durable manner, it must be treated *en masse*, or by sections of a certain extent, determined according to the course and variations of the beds or veins.

"The capital required to establish regular works is considerable —the first outlay, *before a product can be obtained*, is immense. It is affirmed that the Company which work the mines of Anzin, labored during twenty-two years before they succeeded in extracting coal, and spent more than sixteen millions.

"You must undoubtedly, gentlemen, have perceived the difference we have just established between a license, a perpetual one, and the ownership of a mine. *The license*, properly speaking, is nothing else but an authorization, a lease, a privilege. It gives the right to apply labor, capital and industry to the working of a mine, the ownership of which is in other hands.

"Mines licensed in perpetuity were not then true property: but as soon as the law proposed shall be published, all the mines of the Empire lawfully worked, by virtue of acquired rights, become in the hands of those who work them perpetual property, protected and guaranteed by the Code Napoleon.

"As soon, then, as the law shall be published, the grantees become owners by indefeasible title, their property is entirely detached from the surface. *A property* separated from the surface is an entirely new conception.

"The owner may make searches in his land; it is a right derived from ownership. Government may, also, from a motive of public interest, give the permission to others, subject to a prior indemnity in favor of the owner, and the bases of which are settled by article 43 and following of the *projet*."—*Cited in 2d Rey Jurisp. des Mines*, 24, *et seq.*

Commentaries on the Law of 1810.

The law of 1810 has been the subject of many able commentaries, among which we may name those of De Fooz, Dupont, Rey, Blavier, Richard and Lallier, without completing the list.

One of the principal questions to which it has given rise is: What is the fundamental principle of the law as respects the ownership of

mineral property—whether it belongs to the nation or to the owner of the surface. I think, with Mr. Richard, that the law in terms decided nothing on that point, and is no authority in reference to it.

"The system of the law of 1810, as respects the right of property in mines," says Richard, *Legis. des Mines*, 105, "is, not that they belong to the State, nor is it, that they belong to the proprietor of the surface. The *projet* drafted by Fourcroy, and presented to the Council of State, considered mines public property. *In this respect, it conformed to the principles of French legislation from the earliest ordinances on mines, and to the legislation of many foreign nations.* Napoleon, on the contrary, wished to establish the principle that a mine is a part of the property of him who owns the surface. Neither the proposition of Fourcroy, nor that of Napoleon, has passed into the law. It was drafted in accordance with another opinion of the Emperor, who appeared to change his views frequently in the course of the discussions, because the respect due to the principle of private property could not be reconciled with the provisions necessary to be inserted in a law on mines; measures of which the Emperor, more than any one else, appreciated the importance. The ruling idea of the law, first stated by Napoleon, is in effect, the idea of *a new property.* Nowhere is this expressed in the law. But its very silence shows us its directing thought. The second title is headed, *Concerning Property in Mines*, but it does not treat of property in the mine itself, before discovery has given it a known existence. *In effect, it considers a mine, before discovery, as nothing. The right of property conferred by the Civil Code, in the depth, is as respects mines, an ideal and worthless right.*"

On the same point, Mr. De Fooz says: "What is the fundamental principle of the law of 1810?

"On this point we will first quote Fourcroy. 'The system of the law,' he says, 'rests upon this principle, which is uniform with almost every people, that mines are public property, constituting a part of the national domain, and that they belong to the State which causes them to be worked for its own account, or which grants them to individuals to be worked by them under certain conditions.'

"Hence the consequences developed in the projected laws, viz: The concessions should make known to the grantees the obligations

which they will have to perform with respect to the Government. To the latter should especially belong a surveillance, active, continuous, authorative and mandatory; and the concessions should be revoked in case of the nonperformance of the charges imposed by the Government in the name of the social interest.

"Such was the principle of the *domanialité* of mines, which formed the starting point of the *projet* of the law elaborated by Fourcroy.

"But Napoleon was misled by the ideas which he thought to be those of the authors of his Civil Code, and which he had deduced from that Code. He urged that mines were of the same nature as stones and sources of water, which are found in the soil, and which belong to the owner thereof. He so understood it to be established by article five hundred and fifty-two of the Civil Code. The words of the first part of this article are as follows: 'The property of the soil implies the property of the surface and below the surface (*du dessus et du dessous*). The proprietor may make beneath the surface (*au dessous*) the searches (*fouilles*) which he thinks proper, and derive therefrom the products which they may supply.' Plainly, this disposition forms no obstacle to the adoption of the necessary principle of national property in mines. Indeed, it adds a formal reservation, and this reservation exactly refers to mines, 'subject,' it says, 'to the modifications resulting from the laws and regulations concerning mines.'

"What was said by the laws respecting mines at the time of the promulgation of the Civil Code? They declared that the proprietor of the soil might search beneath his property, and extract from it the mines which lie at the surface, such as sands and other matters, which were disengaged from the soil by the aid of simple trenches. This is the prerogative which has received the sanction of article five hundred and fifty-two of the Civil Code. They prohibited the proprietor of the soil, as well as all others, from working mines without having been authorized to do so by a concession from the Government; and it is this prohibition which the authors of the Civil Code have manifestly intended to respect and cause to be respected, in referring to the laws, and even to the simple regulations, then in force respecting mines. Article five hundred and ninety-eight of the Civil Code shows conclusively that Napoleon

gave to article five hundred and fifty-two of the Code a meaning which it did not have.

"One is astonished at the obstinacy with which he contended 'that the authors of the Civil Code had established the principle that in France mines are not subject to any regalian right; that they had given full latitude to the proprietors of the surface; that the liberty which the Code awarded to them would not lead to any abuse; that individual interest is sufficiently enlightened; that there was no necessity of its being stimulated, nor of its being directed by the engineers of mines; that the *esprit* of property would remedy everything; that, in fine, a proprietor has the right to use and to abuse, and that the proprietors of mines should be permitted to abandon them or devastate them.'

"This doctrine of *laisser faire* would infallibly have brought about the ruin of the mineral wealth of France, and of the countries which were its dependencies.

"'It is fortunate,' says Guizot, 'that the boldest minds often hesitate and yield before the consequences which result from the principles which they rashly propose; for it is not given to any one power to govern human affairs to the exclusion of all others.'

"Napoleon was conquered in the conquest which he undertook against the principle of the law of 1791. This principle had found ardent defenders in the Council of State. But the superior did not wish to acknowledge his defeat; and it was to conceal it that he put forth this idea, which is entirely his own: '*That Mines are new property; that the right of working them forms a new wealth;* that mines, as new property, should belong to the grantees on the conditions established in the grant; conditions, in which the Government which grants them ought to include the rights of the proprietor of the soil, conformably to Article five hundred and fifty-two of the civil code.

"Such was the *ruse* to which the head of the Government resorted in order to reconcile the general interest with the sense, erroneous we think, which he had attributed to an article of the civil code."

* * * * * * * * * *

"Such were the general results of the discussions of the Council of State. It is Regnault de Saint Jean d'Angely, its reporter, who speaks in luminous *exposé* of the motives of the law which he

had proposed to the legislative body. 'It has been admitted,' he says, 'on one side, that to attribute mines to the public domain was to wound the principle consecrated by Article five hundred and two of the Civil Code, to attack the great civil charter, the guaranty of the great social *pacte*. It has been admitted, on the other side, that to attribute the property in mines to him who possesses the surface, was to recognize in him the right to use and to abuse, a right exclusive of all means of a useful, productive, enlightened working; a right opposed to the interests of society, which is to multiply the objects of consumption; a right of subjecting to individual caprice, the disposition of all the surrounding property of a like nature; a right that would paralyze everything around him who should exercise it; that is to say, which would strike with sterility all descriptions of mines which should be situate in his neighborhood.'

"Therefore, the law of 1810 has not proclaimed the principle of the public property of mines; it has not given success to the antagonistical principle of private property. It has eluded the difficulty by taking its *point d' appui* in a fiction, viz: *that the property of mines does not exist before the concesion.*

"From this are deduced the following corollaries:

"I. Mines cannot be considered as ordinary property; they constitute a particular creation.

"II. In this creation the right of the proprietor of the surface ought not to be overlooked, forgotten; on the contrary, it is necessary that it be consecrated—paid for.

"III. The proprietor of the surface being disinterested as to all his rights, mines become, by the intervention of the Government, and by virtue of a solemn act of concession, a thing totally distinct from the soil; a property perpetual in the hands of the grantee, a property transferable and transmissible like all other properties.

"IV. Mines thus cease to be precarious property, and become the object of the assiduous care of the mine-workers, who are no longer obliged to sacrifice the hope of the future to the interest of the present.

"We see that the point yielded to the defenders of the public property of mines consists in this, that the law punishes every mine-working which is not preceded by a concession, and confers

the right of surveillance upon the administration and its agents; that the point yielded to the opposite system consists in this, that the proprietor is called to partake of the profits of the mine worked. We also see that the interests of the mine-workers are secured by the law which recognizes that their property is distinct from the surface, and surrounds it with the same guaranties which protect real estate (*propriété fonciere*) in general."—*De Fooz Legis. des Mines, p.* 60.

The Ordinances of 1783 *illustrated by the Spanish Mining Law of* 1849.

By the French law, each mine is held by a special grant, resolved in the Council of State, written out in full with all its conditions, expressing the estate granted, and signed by the grantor.

Under the provisions of the Spanish codes, on the contrary, (I speak of the Ordinance of 1783) all grants of mines, except those special ones which the Viceroys were authorized to make in particular cases, are *Legislative grants.* The estate which the grantor receives is defined by the law, and so are the conditions of the grant. Discovery is the fact from which the title, as defined by the law, is created in each individual case. We look to the *Ordinances* for the quality and quantity of the mine-owner's estate, and for all the burdens and conditions annexed to it, and not to any patent or instrument of grant conveying title and imposing obligations.

To grants of this character we are but little used in the United States; and from our want of familiarity with such, has arisen all the doubts and errors which surround the question of jurisdiction. Let us illustrate this by a very striking example.

On the eleventh April, 1849, a new mining law was passed in Spain, following very closely in many particulars the French law of 1810. It is translated in Halleck's Collection, p. 506.

The law of 1849 granted no other or larger estate in mines than the ordinances of 1584, and those of 1783; but it differed from them in this, that in every case of a concession, a document of title was to be delivered to the miner, setting forth the grant and its condi-

tions. The form of the title is prescribed by the regulations for carrying the law into effect, issued on the thirty-first July, 1849. (Halleck's Col. pp. 520, 579.) I will take the liberty of filling blanks, and then it will read thus:

Title of Property.

"Doña Isabel II, by the Grace of God and the Constitution of the Spanish Monarchy, Queen of Spain: Whereas, I have deemed it proper to grant to Don Pablo de la Guerra, by Royal order of the nineteenth February, 1850, the ownership of the mine of silver called San Salvador, situate in the place called Tapo, in the Municipal District of Santa Barbara, in the Province of Asturias, with the conditions which were stated in said Royal order, and were accepted by the party interested; I have resolved on this, the first of April, 1851, that there be issued to him the present title of property, in conformity with what is prescribed in Article V of the Law on Mining, with the insertion of the following conditions."

[Then follow a description of the mine, and a statement of the conditions; the latter being such as are imposed by law, and relating principally to development.]

"Wherefore, in virtue of this Royal Title, I grant to Don Pablo de la Guerra the ownership of the mine of silver called "San Salvador," *for an unlimited time*, while he complies with the preceding conditions, in order that he may work it, enjoy the products, and dispose of them freely, alienating it in such a manner as he may please; all in subjection to the laws. And in order that the said conditions may be complied with, and observed punctually, both by the said grantee and by the authorities, tribunals, corporations and individuals whom it may concern, I have ordered to be issued this present title of ownership, signed by my Royal hand, sealed with the corresponding seal," etc.

The Ordinances of 1783 speak of the proprietor of a mine as being *the owner of it forever* (*para siempre*).

If a patent were drawn out in favor of a discoverer who registers a mine, naming him, describing the mine, conveying to him a certain estate in it, the quality and quantity of which is defined, and setting forth the conditions of the grant—all in accordance with the plain

provisions of the Ordinances of 1783; in other words, granting by patent just such an estate, in just such a thing as is granted by those ordinances, it would correspond in every respect with those portions of the title of ownership which I have quoted, prescribed by the Spanish regulations of 1849. If things had been put in such a *form*, much of this argument might have been dispensed with.

What is a Mine according to the Ordinances of 1873.

To the discoverer of a mine, the law grants a certain number of *pertenencias*. A *pertenencia*, we will say, is a square of two hundred varas, or five hundred and fifty feet. We will suppose it to be located, the corners being marked with stakes. And proceeding with geometrical accuracy, let us conceive such a solid body as would be that portion of the earth which has the surface of the *pertenencia* for the base of a four-sided pyramid whose apex is in the centre of the earth.

Now, regarding such a pyramid as a piece of property, in how much, and in what part of it, has the mine-owner a right of property? In answer to this question the Ordinances say (*Tit. VIII, Art.* 17): "The miner shall be the owner, not only of the space of the particular vein which he has denounced, but also of all those which in any form, figure or situation, are found within his *pertenencia;* so that if a vein begins in any one *pertenencia*, and passing on, terminates in another, each owner shall enjoy the portion which passes through his respective boundaries, and neither the first, nor any other, on account of having discovered it in his boundaries, or of its being there, can claim it in its whole extent, or wherever it may happen to be."—*Halleck's Col.*, 238.

And again, on this point the Ordinances further provide, that "no miner shall enter upon the *pertenencia* of another, even though it be by going to a greater depth, and by working his own vein; but that each one shall keep and observe the boundaries of his own, unless he amicably agrees and stipulates with his neighbor for the right to work in his *pertenencia*."—*Tit. VIII, Art.* 14, *Halleck's Col.*, 237.

Therefore, each proprietor of a mine owns the entire depth. He may excavate his pyramid—remove its entire substance in the

depth—and any one who enters it without his permission is a trespasser.

To whom belongs the surface? If the mine is on private land, even, the surface belongs to the miner, the owner of the surface having received his land subject to the requirements of the system adopted by the Government for the discovery of mines and the development of mineral wealth. The minerals in the pyramid are of more value to the State than the grass or the grain which the surface might produce. The surface uses are, therefore, made subordinate to the mining—the surface to the depth. That this is another result, and a necessary one, of the subdivision of the earth into two species of things, minerals and surface, each of which is treated as a distinct subject of property, is too plain to require argument. We may, therefore, consider it an undeniable principle of mining jurisprudence, that the surface title is subordinate to the mining title, in all things in which they conflict.

Treating of this matter, Gamboa says: "The question may be raised, whether, upon the discovery of a mine in another proprietor's ground, the owner of the soil is entitled to claim precedence of and oust the discoverer? To which we reply, on the authority of Baldus, Paulo de Castro, Rosenthal, Petrus Barbosa, Bartholo and Capolo, all of whom are cited by Antunez, that the discoverer is to be preferred before the owner of the ground, provided he comply with the directions of the Ordinances concerning registry. First, because he who first takes possession, according to law, is in a better condition. Second, because the mine or vein is not part of the estate, nor did it pass with the land, but is common, and falls to him who first takes possession of it. Third, because he who first sets about exploring and working the vein is in a situation to claim the preference, both by the rules of justice and by the Ordinances of the new code, which confer upon the first discoverer the right of making the first registry, and of taking a larger space of ground, with other privileges which we shall notice hereafter." * * * "Fourth, because it is to the advantage of the public that ores should be searched for, and that mines should be explored and worked by the people generally; and the owner of the soil has, therefore, no right to prohibit them from doing so, nor can he have any right to deprive another of the fruits of his diligence.—1 *Heath. Gamboa*, 136–7–8.

But as this subordination arises from, so is it limited by, the necessities of the mine. Hence, the Ordinances of 1584 provide that the damage done to the surface, whether by searching for minerals, or by working mines, or by occupying sites for reducing establishments, shall be paid its owner according to the award of experts; "and in default of payment of what the surveyors shall estimate, upon oath, as the amount of the damage," says Gamboa, "execution shall be levied."—1 *Heath. Gamboa*, p. 133, § 6.

As by the Ordinances containing the foregoing provision the miner held an estate of inheritance in his mine which might be enjoyed in perpetuity by his heirs and assigns, it may reasonably be considered that, so far as the surface of the *pertenencias* and the sites of reducing establishments were concerned, the amount of damages would be the value of the land, and that the law intended the owner of the mine to be the owner of those portions of the surface, subject to the obligation of compensating their former owner.

But whatever may have been the intention of the Ordinances of 1584 on this point, those of 1783 are perfectly clear. They provide as follows.

"Any one may discover and denounce a vein or mine, not only in common land, but also in the private lands of any individual, provided he pays for the land of which he occupies the surface, and the damage which immediately ensues therefrom, according to the valuation of the experts appointed by the parties, and a third in case of disagreement; the same being understood with respect to him who denounces a place or waters for establishing works and moving the machines necessary for the reduction of ores, which are called *Haciendas*, provided they do not include more land nor use more water than may be necessary."—*Tit. VI, Art.* 14, *Halleck's Col.*, 228.

The provision for the payment of the surface, and of the immediately ensuing damages, in the foregoing article, corresponds precisely with that of the 16th Article of the Ordinances of 1584, in respect to the payment of damages, the words *con tal* of the one corresponding to the words *con que* of the other. In reference to the last named ordinance, Gamboa remarks, that on the judgment of the experts, fixing its value, an execution shall be levied when there is default in payment. The ordinances could not have meant

that no person should *discover* and *denounce* a mine on another man's land without *previously* paying him the value of the surface and the damage which ensues, because these acts, and also the digging of the well, (*pozo de posesion*) must precede possession, and until that is given, there is no fixed surface to be paid for, and no ascertained damage to be compensated. Gamboa's view is, doubtless, the correct one, that the loss resulting to the owner of the surface, from the subordination of his property to the paramount title of the miner, shall be fixed by experts at a money value, and the sum thus ascertained shall be realized by execution, like any other judgment debt. When such subordination extends to expropriation, as by the Ordinances of 1783 it clearly does in respect to the surface of the *pertenencias*, and of the sites of *Haciendas*, the same mode of ascertaining and enforcing compensation is provided.

In fact, the *damages* treated of by Gamboa were substantially nothing more nor less than the pecuniary value of the perpetual right to the exclusive use and enjoyment of the superficies of his *pertenencias*, and of the site of his *Hacienda*, by the mine-owner. It was really the expropriation provided for in plainer terms by the Ordinances of 1783. The same reasoning applies to both. The law, therefore, effects the expropriation, and grants the surface of the *pertenencia* at the same instant that it grants the depth. The surface-owner's estate, in its original creation, was thus subordinate, thus liable to be attracted to, and merged in that of the miner. The great mining policy of the State required it. One or the other must yield—the surface to the depth, or the depth to the surface—otherwise an insurmountable obstacle would be opposed to the development of mineral wealth. It is the policy of the law, drawn from the paramount considerations of encouraging the discovery and promoting the development of mines, to subordinate the surface to the depth. Nor can the owner of the surface complain; for, apart from the consideration that he took his estate subject to be thus divested, the law gives him a personal claim against the mine-owner for the value of the surface, and the remaining parts of his estate are greatly increased in value by the mining establishment which the discoverer has created on his land.

The foregoing are not the only cases of expropriation in favor of the miner. It is provided by the 3d Article of the 8th Title, Ordi-

nances 1783, "that, in the immediate vicinity of the *Reales*, there be sufficient commons and watering places for the pasturage of animals which propel the machinery required for the reduction of ore, or which are required in transporting the ore and other things required and used by the miners, which shall be for the use of all," and that if such lands belong to the Crown, they shall never be sold. If they belong to any individual, church, or religious community, they may be taken from their owner, paying him according to the appraisement of experts, "but with the express condition, that the sales of the said lands shall be understood as applicable to those only which, according to law, may be granted, and to the extent which may be necessary for the said purpose, and no greater, unless the owners voluntarily consent to sell the surplus which may result."

But for many purposes it is not necessary that the subordination of the surface-title should go to the extreme length of expropriation; it suffices that the surface becomes *servient* to the mine. Thus a searcher for mines is permitted to pasture his saddle-beast and pack mule, either in common or private property, without pay; and the private owner of forests, in the neighborhood of mines, is obliged to sell wood to the miner at a fair valuation, and is forbidden to send his wood to other places.

In the particular of which I am treating, the French law differs somewhat from the Spanish. By the provisions of the former, a horizontal partition of the pyramid is effected, the miner owning absolutely the depth, the proprietor of the soil remaining in the ownership and possession of the surface. But the miner can take such parts of the surface as may be required for the purposes of the mine, on indemnifying its owner. On this point, I beg leave to quote the very sensible observations of M. Rey:

"The grant of a mine carries with it the grant of the land which encloses the mine, *on the surface as well as in the depth*, subject to two sorts of indemnity when the expropriation is complete: this is a point we cannot insist on too much, in order to put a stop to all controversy.

"The grant of the depth is definitive, in consideration of a just indemnity collected from the products of the mine; that of the surface

conditional, because it is subjected to the course of the mine; it takes place in consideration of a second indemnity based on double the *revenue* of the portion of which the owner has been dispossessed, payable before possession is taken.

"Hence the grant is of *all the mining land*, but the old owner remains in possession of his land to enjoy it as formerly, and if he is the owner of the surface only, he nevertheless preserves his property perpetually, if the working of the mine does not require that he should be dispossessed, or if he does not require the purchase of the parts of which he is dispossessed.

"*A horizontal partition of the land* is thus accomplished at the moment of the concession, by the very act which grants the property.

"This is one of the most injurious consequences of the grant of a mine. But these consequences are exaggerated at pleasure; persons will not go back to the time of this partition; they forget that without the mine the greater part of all these mining countries would be unknown, or at least without any importance, and that the surface of the lands would be unproductive.

"They will not see that without the mine there would be nothing to change the nature of these lands, and that it is the mine which, in attracting an entirely new population around itself, creates at the same time the wealth of the country.

"And must we, on account of the inconvenience caused by the horizontal partition of the earth, deny the benefits which result from the development of a mine, *the foster mother of a country*, and show our ingratitude towards her by multiplying difficulties in her path?"—2 *Rey, Propriété des Mines*, 3.

The Spanish Mining Law of 1849, imitating in this particular the French law, thus defines a *pertenencia* in Chap. II, Art. 11:

"Each *pertenencia* of a mine constitutes a solid of a rectangular base three hundred *varas* long by two hundred wide, measured horizontally in the direction designated by the party interested, and of an infinite vertical depth, without including the surface."—*Halleck's Col.* 510.

By the common law of England, Mines are considered to be Land.

There is nothing in reason, or in the policy of any laws with which I am acquainted, that prevents the substance of the earth being divided beneath the surface—that horizontal partition so precisely defined by M. Rey in his comments on the French Code, and by the Spanish Mining Law of 1849—into solid sections of such dimensions and relative positions as may be deemed advisable. Certainly, in England nothing is more common than separate estates in the parts of the earth that lie beneath the surface; and those portions of the earth, regarded as the subjects of property, are *land*, just as much as the surface that rests upon them. In proof of this assertion, I offer the following extracts from the very able work of Mr. Bainbridge on Mines and Minerals, a book of great learning and authority. I consider it unnecessary to encumber my argument with reference to reported cases, as the principle is so elementary, and so fully sustained by the cases referred to.

Mr. Bainbridge, in treating of the right of property in minerals, says: "Mines may form a distinct possession and different inheritances. It is a common occurrence, in mining districts, for the ownership of the soil to be vested in one person, and that of the mines in another." (p. 4.)

"The right of property in minerals under the surface, being a claim to *land itself*, and therefore an incorporeal hereditament, cannot be acquired by prescription, which, contrary to the Roman law, from which it is derived, can only confer an incorporeal privilege over lands of others. Prescription, like custom, can only give the right to *work* mines." (p. 5.)

"When mines form a distinct inheritance, and are not attached to the ownership of the lands in which they are situate, or form a part of the demesnes of a manor, a title to them may be acquired and lost in the same manner as to a common estate of freehold."—(p. 31.)

"There can be no doubt that mines and minerals, whether forming a distinct possession or inheritance, or not, are within the provisions of this statute (the statute of frauds). In either case, they form a part of the land itself." (p. 124.)

"When mines form a part of the general inheritance, they will,

of course, be transferred along with the lands, without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a distinct title to them must also be established. In the latter situation, the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made. They are capable of livery, and of being made the subjects of ejectment. 'By the name of *minera*,' says Coke, 'or *fodina plumbi*, etc., the *land* itself shall pass in a grant, if livery be made, and also be recovered in an assize.' It has been stated, that if a grant of mines be made without livery, the grantor will only take a power to dig and work them. But now, by a late statute, all corporeal hereditaments are declared, as regards the conveyance of the immediate freehold, to lie in grant as well as in livery.

"It has also been stated, that a common recovery should not have been suffered of a quarry, or a mine, because they are not in demesne, but in profit only. But this is not correct. Mines and minerals are part of the very lands or demesnes themselves." (p. 141.)

"It was expressly held, before the late statute, that mines do not lie in grant; as real hereditaments they pass by livery of seizin." "Mines are very frequently excepted in conveyance. When the exception contained in a deed of feoffment is in favor of the grantor, there can be no necessity for livery, because the grantor will never have been out of possession of the thing excepted. But when the exception is in favor of third persons, or strangers to the legal estate, this livery cannot be dispensed with." (p. 142.)

"It is scarcely necessary to say that mines, like all other kinds of real property, are subject to the usual laws of descent, devolution, and transfer, by act of law, according to the freehold or chattel interest acquired in them." "Mines held in fee, which are opened, are liable to dower," but not if unopened, where they form an unsevered portion of the general inheritance; but "there is no difference in the liability (to dower) of mines forming a separate inheritance." (p. 157.)

"Mines, of course, may also descend in coparcenery." "The mere right to work mines is, as we have seen, an incorporeal hereditament, existing in the land of other persons; and, when it does

not give an exclusive dominion, it is indivisible, because the division of the right would create new rights, and would prejudice the owner of the soil." "But if the right or license to work mines be exclusive of similar rights, not only on the part of the owner of the lands, but of all other persons, and it is manifest that the owners of the right have the entire power to take away the whole subject matter, the above rule will not apply." (pp. 163–4.)

"It has been said, that a property may be acquired in mines which will be quite independent of the property in the lands in which they are situate. In this condition, the minerals, of whatever character they may be, will, of course, still form parts of the land itself, *and will constitute lands in strictly legal acceptation.* As such, mines become liable to the administration of all the usual remedies relating to the *law of property*, except in those cases which, in consequence of the peculiarity of this species of property, may necessarily demand some modification of these remedies." (p. 490.)

"An action of trespass may be maintained in respect of any improper interference with the enjoyment of mines." "An action of ejectment will also be maintainable for recovering possession of a mine." (p. 492.)

"Although an ejectment will not lie for a bare incorporeal hereditament, yet all the rights and easements of that kind enjoyed with land and mines, may be recovered with the subject matter of which they are deemed to form a part." "It has been decided, that such an action (ejectment) will not properly lie in respect of a license only to work mines." "When the minerals are severed, and become the subject of manipulation, they are mere personal chattels, like the trees which are severed from the freehold, and an action of trover will, therefore, be maintainable for their recovery in that condition." (p. 494.)

Collyer on Mines.

"The property in minerals unsevered from the land, whether held together with or separately from the property in the land, is what the law terms a corporeal hereditament, as distinguished from the mere right to work for them, which is an incorporeal hereditament." [p. 1.] "An estate in minerals is considered an *estate*

in land, and is transferable only under the same restrictions, whether conveyed with or without a conveyance of the adjacent soil." (p. 5.) The same author says, that the statute of frauds, and the statute of 8th and 9th Vic., c. 106, relating to conveyances of land, are equally applicable to mines. (pp. 6–9.) "The rules which regulate the descent, devolution and transfer of interests in land, by operation of law, and their transmission by will, apply to interest in mines, with no distinction deserving of especial notice."

Caldwell v. *Fulton*, 31 *Penn. R.*, 482.

I shall conclude my authorities on this point with an extract from the opinion of Justice Strong, in the above cited case.

"Coal and minerals in place are land. It is no longer to be doubted, that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man, and the mineral right in another. It is not denied in such a case that both are land-owners; both holders of a corporeal hereditament. Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine—separate from the ownership of the surface—because livery of seizin was in their minds inseparable from a conveyance of land, and livery could not be made of an unoccupied mine. The consequence was that they were disposed to regard such rights as incorporeal, though they were not rights issuing out of the land, but the substance itself. In this State, however, livery of seizin is supplied by the deed and its registration, and there is nothing incongruous in considering the grant of the substratum a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning. Even in England, as long ago as the reign of James I, it was held that ejectment would lie for a coal mine. (*Comyn* v. *Wheatley*, *Cro. Jac.* 150.) It was objected that it was beneath the soil, and that an *habere facias* could not be thereof; but the objection was not allowed. Yet ejectment cannot be sustained for an incorporeal hereditament, except, perhaps, in the case of a common appendant, or appurte-

nant. With us, unfettered as we are by the necessity of livery of seizin, and abounding in mineral districts, I am not aware that it has been seriously doubted that the ownership of a coal bed or seam is a corporeal interest in land. Cases not unfrequently occur, in which the owners of lands sell merely the surface right, retaining the minerals which lie in place below the surface. Now as his whole interest was corporeal before the sale, and as by his deed only the surface passed, that which remains ungranted must be corporeal. This proposition needs no further argument, and it has not been questioned in the discussion before us. In *Turner* v. *Reynolds*, 11 *Harris*, 199, a plaintiff in ejectment was allowed to recover a coal mine which he had described in his writ as land; and this, though his title was under a conveyance to him, not of the tract of land, but of the coal."

It was my intention in the beginning—after sketching as plainly as I could some of the leading outlines of mining jurisprudence, and illustrating the subject by the legislation of the most enlightened nations, and the opinions of learned men who have labored with much thought in explaining and elucidating its principles—to conclude this branch of my argument by refuting the positions taken by Mr. Commissioner Thompson on the question of jurisdiction. But I find all his arguments sufficiently answered by what has been already said.

For instance, Judge Thompson says: "The rights of the citizen in mines acquired under the Ordinances in Spain and Mexico, as defined in the Commentaries of Gamboa, present so close an analogy with that of the owner of a right of way, under the common law, as to leave no doubt on my mind that they were identical in their nature." (Trans. 123.) And then making a few extracts from Gamboa, without regard to the subject of which the author was treating, and passing unnoticed everything that he said on the very question under discussion, he adds: "These extracts demonstrate clearly to my mind, that the vein was, in contemplation of law, a thing separate and distinct from the land; and the right which the discoverer or denouncer could acquire in it under the Ordinances was a mere incident to the land or easement, subject to be divested at any time by non-user, or a failure to comply with the conditions

prescribed by them. But this will be still more apparent when I come to consider the causes which, according to Gamboa, operated a forfeiture of the miner's right to the mine, and divested him entirely of all his interest in it. An examination of the following extracts from the Commentaries will show how slight and uncertain was the tenure by which the miner held his right to work the mine; and will establish fully the analogy between the right of way under the common law, and that now under consideration." And Judge Thompson concludes with these remarks: "The laws of Spain and Mexico, regulating the registration, discovery and working of mines, may well be classed with those political laws which, by the law of nations, are abrogated on a change of sovereignty. Their principal object was for purposes of revenue, and as such, they would come within that denomination. If so, they were clearly annulled by the treaty of cession, and all rights acquired under them would necessarily cease and determine."—*Trans.* 123–4–5.

Such is Judge Thompson's understanding of the system of Spanish mining jurisprudence—that monument of the wisdom of Velasquez and Galvez extolled by Alaman. He thinks it confers a mere license to dig; and even this license is so slight and uncertain that it is the very picture of a right of way—(is a right of way slight and uncertain?) Nay, he discovers at last that not even a license is given; that Spanish mining jurisprudence consists of nothing but revenue laws—political laws that confer no rights whatsoever which may not be annulled at any moment by the repeal of the law; that the whole mining system of Spain is nothing more nor less than a farming out of the taxes, which the minerals in the bowels of the earth, like so many individuals, owe the Government, the farmer paying into the Treasury one-tenth of his collections; and that these collections can be at any moment stopped.

This method of collecting taxes, applied to those due by cinnabar, is to say the least, unprecedented by any Government financeering I ever heard of. For these same *revenue laws* tell us, that the tax collector, Castillero for instance, was entitled to all the quicksilver he collected, with the addition of five dollars for every hundred pounds, and if he collected a certain quantity he should have $25,000 more. And moreover, these same *revenue laws* establish a Mining Junta, one of whose principal duties is to advance money to Cas-

tillero to assist him in collecting the taxes due by cinnabar. Certainly, these laws may form a very excellent system of mining jurisprudence, but they are very poor revenue laws. Under such financeering it is not surprising that Mexico is bankrupt.

As fiefs were held by a tenure still more slight and uncertain than that by which a mine is held, I presume they afford a still closer analogy to a right of way. And as the Government of the United States demands a dollar and a quarter per acre for its lands, I suppose that all the preëmption laws are political revenue laws, and that patents issued under them become void when the law is repealed.

I think, may it please your Honors, that I have successfully established the propositions with which I set out. They are the following:

First. That the concession of a mine conveyed to the grantee full property in the very substance of the mine. The words used in describing this right of property are, *propiedad, propiedad y posesion, propiedad y usufructo, propiedad y utilidad, plena propiedad, dominio, pleno dominio, dominio absoluto y perpetuo, dominio directo y útil.*

Second. That a mine considered as a subject of property, belongs to the class variously denominated in Spanish law, *bienes raices, fundos, heredades, tierras, posesiones, predios, fincas,* which are equivalent to the common law term land.

Third. That the quantity, or possible duration of the mine-owner's estate under such concession, was unlimited by any assigned point of time; that it was an estate of inheritance, and might endure in him and his heirs forever.

Fourth. That the quality of his estate was limited or conditional, using these terms in their common law meaning.

Fifth. That if the terms by which the duration of the mine-owner's estate was defined are the equivalent of a limitation, his estate would correspond most nearly to what is known at the common law, as a *fee determinable;* and if such terms are the equivalent of a condition, his estate would correspond most nearly to Mr. Preston's definition of a *fee conditional* at common law; but it is not in all respects identical with either.

And finally, That while a right or title to a mine in California

would of course survive the Mining Ordinances under which it was acquired, just as a right or title to land granted in colonization survives the law of 1824, the repeal of the Mining Ordinances liberates the mine-owner's estate from all conditions, and renders what was before conditional or determinable, a fee simple absolute.

I now proceed to the argument on Mining Claims.

THE MINING CLAIMS.

SECTION I.

The nature and legal effect of discovery and registry in conferring title.

In my argument on the question of jurisdiction, I have shown that DISCOVERY is the VALUABLE CONSIDERATION given by the individual to the State for the grant of a mine.

But in what manner is the grant made under the law by which this case is to be decided? I will read our grant to the Court. It will be found in the second article of the fifth Title of the Ordinances of 1783.—*Halleck's Col.* 222.

"Without separating the mines from my Royal Patrimony, I GRANT them to my subjects in property and possession, in such a manner that they may sell them, exchange them, rent them, donate them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the Mines belongs to them, on the same terms on which they themselves possess it, and to persons capable of acquiring it."

There is the grant; but who is the grantee? The first Article of the next Title answers that question. Under the head of "Modes of acquiring Mines," etc., the law says.

"As it is very just and proper to reward with particularity and distinction those who dedicate themselves to the *discovery* of new mineral places (*Minerales*) and of the metallic veins which exist in them, in proportion to the merit, importance, and utility of such

discovery; I order and command that the DISCOVERERS of one or more mineral hills (*cerros*) absolutely new, in which there is no mine nor trial pit open, may acquire, in the principal vein which they may select, as much as *three* pertenencias, continuous or interrupted," etc.

The law then proceeds to give to the discoverer of a new vein, in a hill known and worked in other parts, *two pertenencias*, continuous or interrupted.

And it was not only the discoverer of a new mine who was rewarded with an unusual number of *pertenencias*. Those who worked mines in partnership—the law desiring to encourage such combinations of capital and labor—were entitled to as many as four *pertenencias*, whether in a new vein, or old and abandoned mines; and this too, without prejudice to the right of the discoverer. That is to say, the discoverer was rewarded with three *pertenencias*, and a partnership with four, and both with seven; so that where a newly discovered mine was worked by a company, as Castillero's was, the whole company, including the discover, was entitled to seven *pertenencias*.—*Tit. XI, Arts.* 1, 2, *Halleck's Col.* 252; *Hoffman's Opinion, p.* 77.

In the foregoing articles of the law, we find that the King is the grantor, the discoverer the grantee, and discovery the consideration of the grant.

But how was it to be ascertained who made the discovery; and who is the grantee; whether the mine belongs to A or to B? This had to be decided, and the Ordinances accordingly referred it to the judicial tribunals of the country, where such questions properly belong.

And again: it is a well-known principle of the Spanish law, with which this Court is very familiar, that the grantees of the Crown were never permitted to take possession of their lands without the intervention of investiture by a magistrate, or by some officer appointed by law for that purpose. In *Chouteau* v. *Maloney*, (16 How. 236) the Court say: "Such an order (meaning, for survey and investiture) was the *uniform accompaniment of a grant*, and without it a concession was incomplete."

"No person," say the *Ordinanzas de Tierras y aguas*, p. 94, "although he may have an older grant than others, can himself

take possession of, survey and mark out his land, unless by judicial authority, and by citation of his neighbors; therefore, whatever is done otherwise shall be null and without effect."

Hence, we find that in almost every colonization grant in California, the grantee was required to present his title to the local magistrate, who in turn was directed to measure off the land granted, and put the grantee in possession of it, the surplus remaining the property of the Nation.

This general policy was consulted in the Mining Ordinances of 1783, and in those which preceded it, by requiring the Justice to whom the question of discovery was referred, formally to invest the discoverer with possession. I will read the law applicable to these two points. It is to be found in Tit. VI, Arts. 4, 5, 6, 7, Mining Ordinances 1783; Halleck's Col. 224–5.

"Art. 4. Those mentioned in the preceding articles must appear with a written statement before the Deputation of Mining of that territory, (*territorio*) or the one nearest, if there should be none there, stating in it their names, and those of their partners (*companeros*) if they have any, the place of their birth, their residence, profession, and employment, and the most particular and distinguishing features of the place, (*sitio*) hill, (*cerro*) or vein of which they ask the grant (*adjudicacion*); all of which circumstances, and the hour in which the discoverer presents himself, shall be noted in a book of registry which the Deputation and Notary (*Escribano*) of Mines, if there be one, shall keep; and, this being done, his written statement shall be returned to the discoverer for his due security, and notices (*carteles*) shall be affixed to the doors of the Church, Government-houses, (*Casas Reales*) and other public places of the town for due information. And I order that, within ninety days, he shall have made in the vein or veins of his registry, a pit (*pozo*) of a *vara* and a half wide or in diameter at the mouth, and ten *varas* down or in depth; and that, as soon as this is done, one of the Deputies shall personally go, accompanied by the Notary (*Escribano*) if there be one, and if there be none, by two assisting witnesses, and a professional Mining Expert (*Perito facultativo de Mineria*) of that territory, to inspect the course and direction of the vein, its width, its inclination to the horizon, which is called *echado* or *recuesto*, its hardness or softness, the greater or less

firmness of its sides, and the species or principal indications (*pintas*) of the mineral, taking an exact account of all this, in order that it may be added to the corresponding part of its registry, with the evidence (*fé*) of possession which shall immediately be given in my Royal name, measuring to him his *pertenencias*, and causing him to fix stakes (*Estacas*) in his boundaries, as will hereafter be mentioned; which being done, there will be delivered to him an attested copy of the proceedings, as a corresponding title.

"Art. 5. If, during the said ninety days, any one shall appear, pretending to have a right to said discovery, he shall have a brief hearing in court, (*en justicia*) and it shall be adjudicated to the one who best proves his claim; but if he appear after that time, he shall not be heard.

"Art. 6. The restorers of old mining places (*Minerales*) which are decayed and abandoned, shall have the same privilege as discoverers, selecting and enjoying three *pertenencias* in the principal vein, and one in each of the others; and both shall be especially rewarded and receive the preference in parity of circumstances, and whenever there may be an opportunity.

"Art. 7. If the question shall arise as to who has been the first discoverer of a vein, he shall be held as such who first found metal in it, although others may have made experimental openings (*cateado*) previously; and in case of doubt, he shall be considered the discoverer who may first have it registered."

From the foregoing, it appears that what the magistrate does is: first, to measure and fix the *pertenencias*, or limits of the mine; and secondly, if within ninety days after he is notified of the discovery, another person should appear claiming to be the discoverer, to hear the case and *adjudicate* the mine to him who best proves his claim as discoverer. But if within ninety days no contestant shall appear, then it will be too late for litigation, and the mine shall remain the property of him who first registered it, and who will by that time have been put in possession of it. These provisions are as remarkable for their wisdom as for their simplicity. They are the result of the experience of more than two centuries.

The law, therefore, conveys the title to the discoverer. The justice merely invests him with possession. And because always under the Spanish law, the investiture of possession is a judicial

act, and because further, a dispute between two persons as to which of them is the discoverer, that is to say, entitled to the mine, is in its very nature a contentious matter, these duties are imposed on the judicial tribunals of the country.

John Doe discovers a mine. On the first of January, 1863, he notifies the proper magistrate that he has made the discovery; he produces the ore; and asks for judicial possession, as soon the pit shall have been dug. On the fifteenth of the same month, he goes to the office of the magistrate, and informs him verbally that he has dug the pit of the dimensions required by law. On the same day, the magistrate, taking with him a Notary Public, if there be one, and if there be not one, then two assisting witnesses, and a mining expert, goes to the mine, down into the pit, ascertains as well as he can the course of the vein, and its dip, or inclination to the horizon, measures the length of three *pertenencias*, equal to sixteen hundred and fifty feet, along the course or superficial direction of the vein; then measures the width of the *pertenencia*, which depends on the dip of the vein, the least width being two hundred and seventy-five feet, which happens when the vein is perpendicular; and the greatest width being five hundred and fifty feet, which is the case when the vein dips at an angle of forty-five degrees to the horizon. (*Ord. of* 1783, *Halleck's Col.* 234-5.) And then he says to the discoverer: "Here is your mine, I place you in possession of it."

On the thirtieth of the same month, Richard Roe appears before the Alcalde, and tells him that he, Richard Roe, and not John Doe, discovered that vein, and asks that it may be adjudicated to him. The magistrate then cites John Doe to appear on a day named for the hearing, with his witnesses to answer this complaint. The day comes, the parties are heard; the magistrate decides that Richard Roe discovered the mine, and that it is his property, and John Doe is ousted; or, he decides that John Doe discovered the mine, and that he is entitled to it in property and possession. Or it may be that Richard Roe does not assert his claim as discoverer until May, 1863. The magistrate would then say to him: "It is too late, you cannot be heard; John Doe, on the first of January notified the Court of his discovery, and notices of his claim were posted on the doors of the church, on the Government houses, and in various other public places, as required by law; the ninety days

allowed all persons by the Ordinances to contest his claim have expired; the law says you cannot now be heard."

Such is the registry of a mine.

The point to which I wish to direct the attention of the Court is this, that the magistrate does not make the grant of a mine; that the law grants the mine to its discoverer; that the functions of the magistrate are limited to receiving, and registering, and publishing notice of the discovery; and to hearing and deciding all disputes as to who was the real discoverer; and to measuring the mine and giving juridical possession of it to him who discovered it. What the law requires of the discoverer is, that he shall notify the proper magistrate of the discovery, describing himself and the site of his mine with reasonable certainty. This done, he shall, within ninety days thereafter, dig a pit of certain dimensions; and when the pit is completed, the law *commands* the magistrate *to give him possession immediately in the name of the King*. The magistrate has no discretion in the matter. The grant is already made by the King to the discoverer, and nothing remains to be done to render it perfect and complete, but measurement and juridical possession.

In support of this position, I beg leave to quote the very able and learned exposition of the law, given by His Honor Judge Hoffman in his opinion in this case.

"It is well said by one of the counsel for the claimants, that the object of the various Mining Ordinances of Spain was to stimulate and promote to the utmost extent the discovery of mines and the development of their riches.

"The means adopted to stimulate *discovery* were to give to the discoverer the mine he might discover—the State reserving for itself a small part of its products. The means by which the development of the riches of the mine was secured, consisted in making the continuance of the right of property dependent on working it to the extent and in the manner prescribed by law.

"Discovery, therefore, was recognized by those laws as the real foundation of the right, and the true consideration for the grant of property in a mine.

"Gamboa considered the discoverers of mines as entitled even to greater encouragement than the inventors of useful arts, (*Heath. Gamb.* 1, p. 259) and in all the Mining Ordinances of Europe the

right of the discoverer is recognized by the promise of a grant of the mine as a reward for the discovery.

"In the *Sala Mejicana* (Vol. II, p. 58) discovery is declared to be one of the modes of acquiring mines, and it is recognized as a species of occupation, and as constituting a source of title, like the finding of a buried treasure, precious stones, and the like.

"In the jurisprudence of Spain and the continental nations, discovery, with regard to mines, as a source of title and consideration for the grant, corresponds with occupation and cultivation under our own preëmption laws with regard to vacant public lands; and in all the claims to lands in Florida and Louisiana, submitted to the Supreme Court, the fact of settlement, under a contract for or with a just right to expect a title, has been regarded as a valuable consideration secured by the State, and creating an equitable obligation to confer the title.

"But this inchoate right created by discovery must be perfected in the manner prescribed by law.

"It is therefore required that the mine be registered; and without registry, says Gamboa, no mine could be lawfully worked; and it remains liable to be registered by any other person, the form of the Ordinance not having been complied with. (Chap. V, § 3. The reasonableness of this regulation, he remarks, is evident. It is not necessary to recapitulate the various arguments by which he vindicates its policy and necessity.

"As the revenue was interested in a portion of the product of the mine; as the public policy required that an account should be taken of so important a part of the national wealth; as the mine-owner, from the moment of registry, became subject to laws designed to secure the development of the mine he had discovered; for these and other reasons, it was indispensable to provide a mode in which the discovery should be formally made known to competent authority, and the right of the discoverer judicially declared and defined. Registry is therefore said by Gamboa to be the fundamental title, or the base of the title, (*el titulo fundamental de las minas*) and the attributive cause of the subject's right of property in it; for the Crown has conceded the mines, and made them common, subject to this burden or condition (*gravamen*).—Ch. V, § 2.

"And in other places he speaks of registry as '*el titulo funda-*

mental del dominio de las minas.'—Ch. XI, § 2; ch. VII, § 3.

"The registry, however, did not constitute the *title* to the mine in the sense of being itself a concession or grant.

"The registry, or formal declaration of the discovery in the manner prescribed by law, was the fulfillment of the condition imposed in the general grant by the Sovereign on the discoverer of mines; and on its performance the law itself annexed the title as the legal consequence of discovery and registry. It still remained subject to further conditions—some to be performed before a formal delivery of possession could be given, and some to be perpetually observed under penalty of forfeiture.

"The registry was therefore required to be made before a judicial tribunal, and not before an administrative officer, who, like the Governors of California, might exercise a discretion as to whether or not the concession should be made. The declaration of the ownership of the discoverer was termed an 'adjudication,' and even after registry, and at any time during the period allowed the person registering for digging the pit, any person pretending to have a right to the discovery was entitled to a hearing '*in Court*,' and the mine was *adjudicated* to him who best proved his claim.

"In Sec. 14 of Chap. V, Gamboa states that 'registries of mines in the Indies are not to be made before royal officers, but before the Justices of the Department alone; and the oath of the discoverer, that he will bring in to be stamped all the gold and silver, etc., is to ensure the due levying of duties, and is not to be made upon the registry of a mine, *the title to which comes under the cognizance of the Justice.*'

"In Section 15, he says: 'But *judicial matters*, such as registry, denouncement, the giving possession, etc., are the province of the Justices, and, by way of appeal, of the royal audiences.'

"In Sec. 24, he defines registry to be 'any judicial order, or proceedings (*autos ó diligencias*) which authenticate and afford evidence of some judicial act.'

"The whole proceeding thus seems to have been the judicial recognition and declaration of a previously existing right, asserted and established in the manner required by law, rather than the creation and conferring of a title which had no previous existence.

"Thus, Gamboa, in speaking of the necessity of registering, says:

'And, therefore, the discoverer, *if he would preserve his right*, should give notice of his discovery, and make himself known."—*Ch. V*, 4.

"So, in Sec. 17 of the same chapter: 'If, after the expiration of the term of twenty days, some other person should come forward and register, the discoverer loses *his right*, this being the penalty he is liable to pay for his culpable default, in neglecting to register *his mine*, and thus frustrating the ends of the Ordinances; for a mine which is worked without being registered is not properly to be called a mine, and does not merit the name, even though it should yield good ore.

"'The Ordinances give the name of mines to such only as are registered, because the registry is the fundamental title (*el titulo fundamental*) to every mine; and because the omitting to make registry evinces a vicious intention to dispose of the ore or silver clandestinely, in fraud of the right of the Crown, and to put impediments in the way of other individuals who might wish to take mines upon the same vein, or at the same spot.'—1 *Heathf. Gamb.* p. 150.

"In neither the Ordinances of 1584, nor in those of 1783, is mention made of any title paper to be delivered to the party, containing, in terms, any grant or concession of the mine.

"His 'statement' is, by the Ordinances of 1783, to be returned to him, after its contents have been duly noted in the register, 'for his security;' and when he shall have dug his pit he is to be put in possession, if no adverse claim be interposed. But the only evidence of his title consists in the judicial ascertainment and record of the fact that he declared his discovery in the form required by law, which being done, the law itself gave the title on the conditions fixed by the Ordinances. When the pit had been dug, and judicial possession given, the 4th Article of the Ordinances of 1783, directed, as we have seen, that an authorized copy of all the proceedings (*de las diligencias*) should be given him as his corresponding title (*como titulo correspondiente*). To perfect and secure the right to a mine, registry was, in all cases, indispensable. In making it, all that was necessary was 'to manifest the person, the place, and the ore.' But if the mine had previously been worked, and was denounced for abandonment or other cause of forfeiture, a pre-

liminary proceeding, called a denouncement, was required. This was in the nature of an accusation against the former owner, charging him with having left the mine unworked, or having come within some other ground of forfeiture. Upon this question a summary judgment was had, after notice to neighbors, proclamation, etc. If the mine was declared forfeited, the denouncer was, nevertheless, obliged to register it, and go through the same proceedings as the discoverer had done.—*Heathf. Gamboa, Chap.* V, *Tecs.* 21–22, *p.* 153.

"That the discoverer of a mine was recognized by the law as having acquired a right to it even before registry, is further shown by the terms of the twentieth Ordinance of 1584, which enacts that 'No person shall presume to register, or to enter in the register, a mine which is not *his own property*, under the penalty of one thousand ducats,' etc.

"Among the cases mentioned by Gamboa, to which this law applies, is that of a person other than the discoverer of the ore registering a mine before the expiration of the twenty days allowed by the Ordinance to a discoverer for registering his mine.—1 *Heathf. Gamboa, pp.* 156, 158.

"The discoverer is thus treated as the true owner of the mine, until, by failing to register within the time prescribed, his rights are lost; and the registry of the mine within that time by any person in his own name is considered and punished as a fraudulent attempt to acquire the property of another, like a similar act by the mortgagee of the mine, or by the curator or tutor of a minor, and other cases mentioned by Gamboa.

"From these and many other provisions in the Ordinances, and passages in the Commentaries of Gamboa, the nature and effect of registry is unmistakably manifested; nor can our views of it depend upon the meaning we attach to a single phrase of Gamboa, (*el titulo fundamental*) as to the correct translation of which a question was raised at the Bar.

"The foundation of the right to a mine was discovery. But this right was lost, unless the discoverer made known the fact before the judicial tribunal authorized to receive such declarations. The proceeding for the purpose was entirely *ex parte*, and consisted merely of a production of the ore, a description of the place

where it was discovered, and the person of the discoverer. These facts being duly made known and recorded, the title passed by operation of law, unless within the time limited some one having a better right appeared. The foundation of the denouncer's right was in principle the same.

"Having brought to the notice of the court, and established that a mine was abandoned or had been forfeited, the law gave him the right to register it in his own name, like a new mine, except that not being an original discoverer, the mining space (*pertenencias*) to be assigned to him was more limited.

"The registry cannot be regarded as the base of the title to the mine, in the sense that without registry a right of property could, in no case, be asserted to it; for as we have seen, even after registry by an alleged discoverer, and after he had dug his pit, obtained judicial possession, and even had his *pertenencias* measured, any one pretending to have a right to the discovery could, within ninety days from the date of the registry, assert his claim and procure the mine to be adjudicated to him; but where no objection was interposed, and the person registering was the true discoverer of the mine, the causing it to be registered, or the formal declaration of his discovery, was the fulfillment of the condition established by law upon which his inchoate right as a discoverer became a perfect right of property (although until the pit was dug he was not entitled to a judicial delivery of possession, nor could he alienate the mine). And the register itself, or the record of the procedure, became his fundamental title *paper*, or *evidence of his title*, for it established judicially the fact of the discovery, and the fact that he had declared it as required by law.

"I have thus endeavored to arrive at a clear conception of the nature and effect of the registry of a mine, and of the rights of a discoverer, that we may be the better able to judge of the validity of the alleged registry by Castillero, and correctly to estimate the equitable or inchoate rights he may have acquired as the discoverer of a new mine.

"Having premised this much as to the rights of a discoverer, and the nature, objects and effect of a registry, we will now particularly consider the provisions of the articles under examination.

"It will be observed, that to effect a registry, and to entitle him-

self to the judicial delivery of possession of the mine, the only acts required of the discoverer were: 1st, his appearance before the deputation, with a written statement of the facts necessary to be set forth; and 2d, that he should within ninety days thereafter, make a pit in the vein of his registry of the required dimensions.

"The noting in the book of registry of the contents of the statement; the hour at which the discoverer presented himself; the notices for due information, etc., were acts to be performed by the Judge or Deputation. It would seem that any injurious effect on the discoverer's right by the omission of the first of these formalities, was intended to be provided against by the direction that the written statement should 'be returned to him for his due security,' and it is presumed with a certificate annexed of the fact and time of its presentation.

"We learn from Gamboa, that in 1727, the Viceroy Marquess of Casa Fuerte issued an order, dated at Mexico, commanding the royal officers and justices to send an account of the mines within their several districts, whether at work or abandoned, etc.; and in case they should have no book of registry for the mines which might have been registered there, to form one with all possible dispatch, that an account might thus be obtained of all the mines in the kingdom, from which a general book might be made up, etc. 'But we are not aware,' says Gamboa, 'that this order, so agreeable to the spirit of the Ordinances now under consideration, and so important to the interests of the revenue in a public, and of the subject in a private point of view, was ever carried into effect.' We find here no intimation that the failure of the officer to enter the registry in a book in any way impaired its validity; and this, notwithstanding that the Ordinance he was considering (Art. 19) expressly requires the Mining Administrators of each district to keep a book in which all registries made in such district were to be entered, and for this purpose the miners were required to send authenticated copies of such registry to that officer.

"Gamboa goes on to observe, that 'the original proceedings (*diligencias*) ought *not* to be given into the custody of the owners until the registry, etc., be made in the proper book; for otherwise these important instruments would be exposed to the contingencies alluded

to above, and very serious difficulties may arise in subsequent dealings in ascertaining whether the registry or denouncement was made with due solemnity; the time and manner of making it; the greater or less antiquity of the mine,' etc.

"This suggestion appears to have been adopted in the Ordinances of 1783, which provide, as we have seen, that the contents of the statement and the hour at which it was presented shall first be noted in the book of registry, and the statement then returned to the discoverer 'for his due *security*.'

"The registry having been effected, the working of the mine could lawfully be commenced at once; and within ninety days the pit was required to be dug. As soon as this was done, formal possession could be given.

"If, however, the party who had registered the mine failed to do this, his rights were, by the Ordinances of 1584, forfeited, and the mine might be denounced by and adjudged to another. As, however, from the nature of the vein, a pit of the depth of three *estados* might be wholly unnecessary; or the hardness of the rock, the caving in of the pit, the breaking out of springs of water, etc., might prevent the digging of the pit within the time limited, it was provided by the Ordinance that the Justice, on an application made to him, and an investigation, might dispense with this requirement of the law, or enlarge the time for its fulfillment, as might be necessary.

"In the Ordinances of 1783, the penalty of forfeiture is not in terms imposed for the omission to dig the pit within ninety days. It is presumed, however, that a breach of so positive and important a provision of law would, if without excuse, under the later Ordinances, have rendered the mine liable to denouncement.

"By article four of the Ordinances of 1783, the *pertenencias* of the mine were required to be measured, and the stakes fixed in the boundaries at the time possession is given.

"By the Ordinances of 1584, the miner was not obliged to do this until cited by some neighboring miner 'who asked for stakes.' Ten days were then allowed him to select the ground he might prefer; or, using our mode of expression, to *locate* his *pertenencias*—subject, however, to the condition that his original pit of possession, or fixed stake, should be within the limits of the boundaries he

might select. If he failed to make his selection within ten days, his boundaries were established by the Justice. But this designation of his *pertenencias* was not final; for he might at any time afterwards, on discovering the true course of the vein, etc., apply to have his stakes bettered, (*mejorar las estacas*) and his boundaries might be altered in any way not injurious to the neighbor, between whose mine and his own the boundaries had already been established.—1 *Heathf. Gamb. pp.* 297–8, 325; 2 *Heathf. Gamb. p.* 10.

"The frauds and litigation to which this practice gave rise, led Gamboa to suggest that every mine-owner should, by positive ordinance, be required to set out his boundaries at the time possession was given, under pain of incurring the forfeiture of the mine and of being *ipso facto* deprived of it, even though not denounced by any other party.—2 *Heathf. pp.* 10, 11.

"This suggestion was adopted in the Ordinances of 1783, except that the omission to set out the boundaries at the time possession is given, was not declared to forfeit the mine *ipso facto*. [Nor in any other manner.]

"But, notwithstanding this establishment of boundaries, the miner could improve the location of his stakes (*mejorar las estacas*) or change his boundaries by the authority of the deputation of the district, provided it could be done without injury to his neighbors, who were to be summoned and heard in the matter.—*Ord. of* 1783, *Art.* 11, *Halleck's Trans. p.* 236.

"It thus appears that the giving possession was, under the Ordinances, a formal proceeding, like a livery of seizin, of which the measurement of pertenencias, or the establishment of boundaries, did not of necessity form a part; and that although these acts were required to be done by the Ordinances of 1783, their omission did not forfeit the right of property acquired by the registry; still less does it appear that their performance was a condition precedent to the vesting of the title.

"In all cases where land was granted under the Mexican colonization laws, a formal judicial delivery of possession was in strictness required. But it has never been held by the Supreme Court, that this formality was necessary to vest the title or right of property; and in the majority of cases passed upon by this Court it was not

given. In its own nature, it was an act which supposed the existence of title acquired, but had no effect in conferring one; that having already been done by the concession or grant. I see no reason to make any distinction between the judicial delivery of possession of an agricultural grant and that of a mine, or for considering that the omission of that formality would be fatal to a right of property already acquired in the one case, more than in the other.

"We shall see, however, when we examine the proofs in this case, that the Alcalde, accompanied by witnesses of assistance, gave to Castillero judicial possession of the mine he had discovered, as well of three thousand varas in all directions from it, which he undertook to grant him; that no pertenencias were measured or stakes fixed, but that Castillero had already commenced working the mine, and had dug a pit, the precise dimensions of which do not appear; that he continued in possession, and working his mine, with the full knowledge, not only of the authorities of the Department, to whom he made known his discovery, but of the American Consul, and the inhabitants generally; and that this possession has been retained by his assigns and representatives to the present day."

Section II.

Regularity of Castillero's Proceedings in Registry.

Having thus shown that the law attaches title to discovery, and that all subsequent measures are intended to ascertain juridically the true discoverer, and to place him in possession, I will now set forth what Castillero did after he discovered the mine; and it will be found that he followed strictly the directions of the law.

In the first place, he handed to the Alcalde his written statement in these words.

Senor Alcalde of First Nomination:

Andres Castillero, Captain of permanent cavalry, and at present resident of this department, before your notorious justification, makes representation: that having discovered a vein of silver, with a ley of gold, on the land of the rancho pertaining to José Reyes

Berreyesa, retired sergeant of the presidial company of San Francisco, and wishing to work it in company, I request that in conformity with the Ordinance of mining, you will be pleased to fix up notices, in public places of the jurisdiction, in order to make sure of my right when the time of the juridical possession may arrive, according to the laws on the matter. I pray you to provide in conformity, in which I will receive favor and justice; admitting this on common paper, there being none of the corresponding stamp.

Pueblo of San José Guadalupe, November 22d, 1845.

ANDRES CASTILLERO.

Discovering a few days afterwards that the ore was very rich in quicksilver, he presented to the Court another written statement in these words.

SENOR ALCALDE OF FIRST NOMINATION:

I, Andres Castillero, Captain of permanent cavalry, before your well-known justification, appear and say: that on opening the mine which I previously denounced in this Court, I have taken out, besides silver with a ley of gold, liquid quicksilver, in the presence of several bystanders, whom I may summon on the proper occasion. And, considering it necessary for the security of my right so to do, I have to request of you, that uniting this representation to the denouncement, it may be placed on file, it not going on stamped paper because there is none. I pray you to take measures to this effect, in which I will receive favor and grace.

Santa Clara, December 3d, 1845.

ANDRES CASTILLERO.

These written statements contain all that the law required; and so completely do they fill its requisitions, we are induced to believe either that Castillero had the law before him when he wrote them, or, as is more probable, being a man of education, devoted to the science of mineralogy, and fond of mining enterprises, his experience in Mexico had made him familiar with the forms of registry.

It only remained for him to dig the pit of the proper dimensions, and to inform the Alcalde of the fact. That was done, as the Alcalde states in his record of proceedings at the mine when, he gave Castillero the juridical possession of it.

That record is in these words.

"There being no deputation on mining in the Department of California, and this being the only time since the settlement of

Upper California that a mine has been worked in conformity with the laws, and there being no 'Juez de Letras,' (professional Judge) in the second district, I, the Alcade of First Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office, for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the rancho of the retired sergeant José Reyes Berryesa, the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the Republic; I have granted three thousand varas of land in all directions, subject to what the General Ordinance of Mines may direct, it being worked in company; to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the expediente, deposited in the archives under my charge; this not going on stamped paper, because there is none, as prescribed by law.

Juzgado of San José Guadalupe, December—, 1845.

(Signed) ANTONIA MARIA PICO.

Assisting witnesses:

Antonio Suñol,

José Noriega."

Which being done, there was delivered to Castillero a certified copy (*copia autorizada*) of the proceedings as his corresponding title, in compliance with the terms of the law.

The court will observe that the date of this record is December—, 1845. In the certified copy of the act of possession given to Castillero the blank is filled, Dec. 30th, 1845. This difference may be naturally accounted for, by supposing that the clerk, or other person, employed to write out the record in duplicate, knowing that the possession had been given in December, and not certain of the day, left it in blank. That the Alcalde and the assisting witnesses illiterate persons, who did business in the simple manner of those times, signed both the original and the copy without filling the blank; that Castillero, on looking over his copy and observing the omision, had the blank filed, which could be done without consulting

the original, for he and the Alcalde, and the assisting witnesses, all knew the date of the proceedings; while the original being filed in the archives of the Alcalde's office, the blank in it was not observed, and was never filled.

Another feature in this record is worthy the attention of the court. It will be observed, that the Alcalde *did not grant* to Castillero the mine of Santa Clara, but resolved to act in virtue of his office, with two assisting witnesses, for want of a Notary Public, "for the purpose of *giving juridical possession of the mine of Santa Clara*," &c. But after reciting that the laws in force strongly recommend the protection of an article so useful as quicksilver, he proceeds to *grant* three thousand varas of land in all directions, subject to what the Mining Ordinances may direct, the mine being worked in company,

It is not pretended by the claimant that the Alcalde had the power to make the grant of three thousand varas in all directions from the mine, nor to make any grant whatever to Castillero: for, I hold, the power of the Justice was confined to the giving of juridical possession of that which the Republic had already granted to Castillero, the discoverer. But, as we shall see, all the acts of the Alcalde in these proceedings were confirmed by the supreme Government of Mexico, whose power was competent therefor.

Nor is it pretended by the claimant, that, in giving juridical possession of the mine, the Alcalde followed the directions of law in respect to the measurement and demarcation of the *pertenencias;* but we contend, in opposition to the Government on that point, that our *title* was not *destroyed* by reason of a loose and informal possession; nay, that if the Alcalde had wholly failed or refused to give possession at all, our title would not have been destroyed, or in any manner weakened, by such neglect or dereliction of duty. Castillero discovered the mine and registered it. Thereupon the law fulfilled its promise by conferring on him the title to it. If the Mexican Government had said to him: "Although you have done all that was required of you, you have lost your title, and it has reverted to the nation because *their magistrate* has failed to follow the directions of the law in some respects, while investing you with possession," the gross absurdity of the proposition could scarcely have been exceeded by its gross injustice. But the Mexican Gov-

ernment said no such thing. On the contrary, it *acknowledged* his title; *confirmed* the acts of the Alcalde in those particulars in which they exceeded his power; *granted* Castillero two square leagues around his mine for firewood; and even endeavored, in the disordered and crippled condition of the country, to advance him money in aid of an enterprise which so deeply involved the prosperity of the nation. Before this Court, the United States occupy, in regard to Castillero, the former position of the Mexican Government. Let us occupy it effectively in fact, as we do theoretically in law, by fairly and honestly fulfilling its obligations.

Gamboa, a very able lawyer, who, in the course of a large practice in mining cases, had acquired much experience of the difficulties resulting from disputes concerning boundaries, recommended in his Commentaries, published in 1761, among various other amendments of the Mining Ordinances, the following: "That a positive ordinance should be issued, directing that every one should set out his boundaries at the time of possession being given, even though the adjoining mine-owner should not require it, under pain of incurring forfeiture of the mine, and of being *ipso facto* deprived of it, even though not denounced by any other party.—2 *Heathf. Trans.* 10-11.

But in this respect his recommendation was not adopted, and for obvious reasons; for in the first place, the Ordinances of 1783, unlike those of 1854, the subject of Gamboa's Commentaries, require that the boundaries of a mine shall be determined by the course and dip of the vein—facts to be ascertained by the Mining Expert who is to accompany the magistrate, and not by the discoverer himself; and secondly, because it is the intention of the law, manifested in many provisions, to give to the discoverer the richest portion of the vein that can possibly be included within the lines of his *pertenencias*, without interfering with private rights, the directions concerning measurement being dictated solely by a regard for that object; thirdly, because so far as the convenience or the rights of third parties are involved in the establishment of the boundaries of another's mine, they are sufficiently provided for by the Ordinances of 1584, (not repealed in this particular by those of 1783) which authorize one mine-owner to demand of another by legal process, that he fix and mark out his boundaries as the law directs; and

last, because the Government having entrusted the measurement and demarcation of the mines to its own officers, would not commit so great an injustice as to punish the miner, who had in nothing offended, for the neglect of the magistrate to follow the directions of the law.

I have said that Gamboa's recommendation was not followed in the Ordinances of 1783. I will now prove the assertion.

Immediately after the general grant, made in Art. 2, of Tit. V. (*Halleck's Col.* 222) before quoted, come the conditions.

"Art. 3. Let this grant be understood to be upon two conditions: first, that they shall contribute to my Royal Treasury the prescribed portion of metals; and second, that they shall work and enjoy the mines complying with what is prescribed in those Ordinances, so that they shall be considered forfeited whenever a failure shall occur in complying with those Ordinances in which it is so provided, and that they may be granted to any person who for that cause may denounce them."

And again in Art. 11, Tit. VI, (*Halleck's Col.* 227) it is provided: "If any one denounce a mine as forfeited (*perdida*) on account of the nonobservance of any of the Ordinances which carry this penalty imposed, it shall be granted to him, provided that any of the prescribed causes shall be lawfully established and proved."

It is therefore apparent that it is not a failure to comply with any of the mandatory or directory provisions of the Ordinances, which is attended by a forfeiture of the mine; and that this severe punishment is inflicted in those instances only where the law plainly and expressly says to the mine-owner, if you fail in doing this, you shall lose your mine; or if you do this, you shall lose your mine. In that part of my argument which relates to the jurisdiction of this Court I have carefully set forth the five causes of forfeiture prescribed by the Ordinances—they will be found on pages 269, 270.

Failure to "set out his boundaries at the time of possession being given" (Gamboa's recommendation) is not one of them, *and could not be;* for the measuring of the *pertenencias* is made by law the duty of the magistrate who gives possession, and neither the duty nor the privilege of the discoverer who receives it. It would be strange indeed if the law should punish the mine-owner with the

loss of his mine for failing to do that which the same law, by entrusting its execution to a judicial officer, declared he should not do.

And now, to substantiate what I have said, and to support one or two very important points which I desire to present to the Court, I will quote all the provisions of the Ordinances which relate to the measurement and demarcation of mines.

The matter is touched first in the latter part of the 4th Article of the 6th Title, (*Halleck's Col.* 224–5) where the Justice is required to take an exact account of certain things relating to the mine, "that it may be added to the corresponding part of its registry, with the evidence (*fé*) of possession, which shall immediately be given in my Royal name, measuring to him his *pertenencias*, and causing him to fix stakes in his boundaries as will hereafter be mentioned."

The matter is next mentioned and disposed of in the 8th Title, part of which I quote.

"TITLE VIII.

"*Of pertenencias and intermediate spaces, and of the dimensions which, in future, mines are to have.*

"Art. 1. Experience having proved that the equality of the dimensions of mines established on the surface cannot be observed underground, (*en la profundidad*) where they are really of value, it being certain that the greater or less inclination of the vein to the plane of the horizon makes the *pertenencias* of the mines larger or smaller, so that there does not result that true and effective equality which it has been desired to establish between subjects of equal merit; as it may well happen that when a miner, after much expense and labor, reaches the boundaries where the metal begins to be abundant and rich, another person compels him to turn back, as being already at the boundaries of his *pertenencia*, because of his having denounced the next mine, and having placed himself at that point with more cunning than labor; so that from this arises one of the greatest and most frequent causes of litigation and dissension among miners: Wherefore, and considering also that the limits established in the mines of these Kingdoms, and by which those of

New Spain have until now been regulated, are very confined in proportion to the multitude, abundance and richness of the metallic veins which, of His great bounty, the Creator has been pleased to bestow upon those regions, I order and command, that in mines which shall hereafter be discovered in a new vein, or without neighbors, (*sin vecinos*) the following dimensions shall be observed.

"Art. 2. On the thread, direction or course of the vein, whether of gold, silver or any other metal, I grant to every miner, without distinction as to discoverers, (who already have their reward specified) two hundred Castillian *varas*, which are called *de medir*, (long or running measure) taken on a level, and as has hitherto been understood.

"Art. 3. To make what is called a square, (*quadra*) that is, to make a rectangle with the preceding measurement, supposing the dip or inclination (*echado ó recuesto*) of the vein to be sufficiently shown in the pit of ten *varas*, the *pertinencia* will be measured by the following rule.

"Art. 4. The vein being perpendicular to the horizon, (which rarely happens) one hundred *varas* shall be measured on a level, either side of the vein, or divided on both sides, as the miner may desire them.

"Art. 5. But the vein being inclined, (which is usual) attention shall be given to its greater or less dip, in the following manner.

"Art. 6. If to one *vara* in depth the inclination be from three fingers (*dedos*) to two hands, (*palmos*) the square given shall be of the same one hundred *varas*.

"Art. 7. But if to the said one *vara* in depth there be an inclination of

2	hands	and	3	fingers,	the	square	(*quadra*)	shall be	112½ *varas*.
2	"	"	6	"	"	"	"	125	"
2	"	"	9	"	"	"	"	137½	"
3	"	"	0	"	"	"	"	150	"
3	"	"	3	"	"	"	"	162½	"
3	"	"	6	"	"	"	"	175	"
3	"	"	9	"	"	"	"	187½	"
4	"	"	0	"	"	"	"	200	"

So that, if to one *vara* in depth there be an inclination of four hands, which is one *vara*, there shall be granted to the miner two hundred *varas* square (*por la quadra*) and on the dip of the vein; and so on with the remainder.

"Art. 8. And considering that, in the manner prescribed, any miner may reach the perpendicular depth of two hundred *varas* without exceeding the limits of his *pertenencia*, by which time, usually, he will have considerably exhausted the vein; and considering that those which have a greater inclination than that of *vara* for *vara*, (that is, 45°) are either barren or of little duration, it is my Sovereign will that, although the dip or inclination of the vein may be greater than the dimensions indicated before, the square (*quadra*) shall never exceed two hundred *varas* on the level, and that these dimensions shall always be the width of the said beds or lodes, (*Mantas ó Vetas*) along the whole length of the other two hundred *varas*, which have been determined above.

"Art. 9. But if any miner, suspecting any other vein of a contrary inclination or variation from his own, (which rarely occurs) shall desire to have given to him any part of his square in a direction opposite to the inclination of the principal vein which he has denounced, it may be granted to him, provided that no fraud be shown, or prejudice result to a third person, and not otherwise.

"Art. 10. In the *Placeres*, pockets, (*Rebosaderos*) or other irregular deposits (*Criaderos*) of silver and gold, I order that the *pertenencias* and measurements shall be regulated by the respective territorial Deputations of Mining, attention being given to the extent and richness of the place (*sitio*) and to the number of applicants, preferring and distinguishing only the discoverers; but with the obligation that said Deputations give an exact account thereof to the Royal Tribunal General of Mexico, in order that it may determine thereupon as it may think and deem most efficacious for avoiding all collusion.

"Art 11. The *pertenencias* being regulated in the manner prescribed, there shall be measured to the denouncer his *pertenencia* at the time of taking possession of the mine, he being required to set up, in his boundaries, stakes (*Estacas*) or land-marks, (*Mojones*) secure and easily distinguished, with the obligation of having them kept and preserved perpetually, without the power to change them, even though he allege that his vein has varied in course or inclination, (which are unusual things) but he must be content with the lot which Providence has assigned to him, enjoying it without disturbing his neighbors; if, however, he shall have no neighbors, or

if he can, without injury to them, improve the location of his stakes, (*mejora de Estacas*) or change his boundaries, he may be permitted to do so for such causes, with the previous intervention, knowledge and authority of the deputation of the district, which shall summon and hear the parties as to whether they may be and are legitimate."

Every one must admire the spirit of justice in which these provisions are conceived, and the anxiety of the law-giver to secure to his subjects the fruits of their meritorious discoveries. The difficulties of the subject were great. For while it was the principal object of the law to give to the discoverer the best part of the vein which could be included within the limits of his *pertenencias*, yet it was not the sole object. Other mines had to be located on the same vein, adjoining, perhaps, the first. Boundary lines between them must be established. Monuments must be set up. Each mine-owner must know his limits. There was not time to wait for such a knowledge of the vein as can be acquired only by the expenditure of money, and by years of labor. In many cases it is impossible in the beginning to ascertain the course of the vein; what is its direction, whether it is straight or bent; what is its dip or angle with the horizon, whether great or small; what part of it is richest; has it branches or spurs, and on which side; for these are matters which require much development to reduce to certainty, and until then all is guess work. But the law, while working in the dark, as it necessarily must, does its very best for the discoverer. It sends a Mining Expert to examine his vein as far as it is disclosed by the pit, and directs the Magistrate to measure off the best of it for him. The *pertenencia* need not be quadrangular; but bent, if the discoverer please. And after the measurement has been made, and the monuments set up, and years—no matter how many—have elapsed, if in the progress of development it shall appear that the direction of the vein, or its dip, or both, are different from what was first supposed, the mine-owner may apply to the Magistrate to measure the mine anew, to alter his boundaries, and in the language of the law, *to better his stakes;* provided, of course, that such change would not affect third parties injuriously. The old title remains; it is the measurement only that is changed. The title from the beginning was intended to cover as much of the vein as the dimensions of the *pertenencias* could include, and the best part of it. The

limits were fixed with that object, but the officers were mistaken—the vein lies here, and not there; the error shall be corrected, says the law.

Now, if the Alcalde on giving possession had measured Castillero's pertenencias, and caused him to fix stakes in the corners of his quadrangle; and if between that time and this it had been ascertained that the limits were fixed in ignorance of the true course and dip of the vein, I think that the claimant would have a good right in law and equity to ask this Court in its decree to require the Surveyor General of California, in locating this claim, to disregard the first measurement, and to fix the limits of the mine as they would have been had the Alcalde known what is now known of the nature of the vein.

However that may be, it is certain that a title to a mine, no more than a title to the surface, is invalidated by the want of measurement and juridical possession. And I think a very strong reason may be given why the validity of the former is less affected than that of the latter by such an omission. It is this: after correct measurement is made, and formal possession given to a grantee in colonization, the law does not permit him to change his boundaries, for the very good reason that the land was measured and delivered by an officer who either possessed, or had the opportunity of acquiring, full knowledge of all the facts upon which the proper location depended at the time it was made. With the measurement of a mine the case is different. In almost every instance it is impossible, in the early period when measurement is required to be made, for the officer to ascertain the facts which will enable him to define the *pertenencias*, as the law would have them defined; he can only do the best that his limited knowledge will allow. Subsequently ascertained facts will, in all probability, prove that he was in error. The mine-owner shall not be injured by his ignorance or mistake; for, at any day, a new measurement may be made and a new possession given, such as it would have been at first had the same facts then been known. Hence it follows, that as between the Government and the grantee only, measurement and possession were almost useless formalities; for why measure to-day what may be changed to-morrow?

In the case of *Chouteau* v. *Moloney*, 16 How. 236, we are told

that although an order of survey was the universal accompaniment of a Spanish grant, and without it a concession was incomplete, *yet, if circumstances interfered with its execution, the completeness of the title was not thereby lessened, if the description of the land were such that it could be carried into a survey.* Now, the very nature of a mine, with its subterranean secrets, interferes with such a perfect execution of its measurement as the law anxiously desires to make in favor of the discoverer. And the more fully it is developed, and the more accurately the course and dip of the vein are known, the more thoroughly will the intention of the law be executed. If this Court, confirming Castillero's title, should order the Surveyor General of California to locate his mine as its limits are determined by the Articles of the Ordinances, quoted above, which survey shall be final, it is obvious that the claimant would even then lose an important privilege, if not a legal right—I mean the privilege or the right of having his stakes bettered at some future time, if it should be found that the surveyor failed to run his lines on the surface so as to include the vein in its length or in its dip, as the discoverer was entitled to have it.

Although there is difficulty in ascertaining the objects called for in a mining grant, yet *the description of a mine is such that it can be carried into a survey with the most perfect accuracy.* For the difficulty I allude to arises, not from *uncertainty in the description*, but from the physical impediments in the way of getting at objects which are described with absolute precision. The difficulty is, in its nature, (however it may differ in degree) just the same as the surveyor would experience in actually running a line from one marked tree to another, through a dense forest, or Serbonian bog, or over the summit of Mount Blanc. It is purely physical, and by time, and money, and labor, can certainly be removed. For, "*the thread, direction, or course of the vein*," to use the language of the Ordinances, can be ascertained with certainty; and along it the *pertenencias* must be measured. And "*to make what is called a square, (quadra)* that is, *to make a rectangle with the preceding measurement, supposing the dip or inclination of the vein to be sufficiently shown in the pit, the pertenencia will be measured by the following rule.*" The Ordinances then lay down the rule, and prescribe with perfect accuracy how the measurement shall be made.

For these reasons, I feel very confident that all mining grants under the Ordinances of 1783, describe the *pertenencias* with such certainty, that they can be surveyed and located with mathematical accuracy.

Therefore, if I am right in holding that title immediately follows discovery, or discovery and registry, and that the law which makes the grant, so describes the thing granted, that its description can be carried into survey, then the claimant's title should be confirmed; for in the language of this Court, its completeness is not lessened by reason of the failure of the Mexican magistrate to define the limits of the mine, when he formally invested Castillero with possession.

One more suggestion before I leave this point. "To make what is called a square," (says the Ordinances, Art. 3, Tit. VIII, Halleck's Col. 234,) "that is, to make a rectangle with the preceding measurement, *supposing the dip or inclination of the vein to be sufficiently shown in the pit of ten varas*, the pertenencia will be measured by the following rule." But suppose the dip or inclination of the vein be *not* sufficiently shown by the pit of ten varas, what then? The law does not say, we must presume, that the possession would be given, but the measurement postponed until further developments had disclosed the dip or inclination of the vein; and may not that have been the reason why the Alcalde, who was not accompanied by a Mining Expert, for there was none in California, did not measure the *pertenencias* when he gave possession. The Alcalde and his assisting witnesses were plain, illiterate, pastoral people, wholly unacquainted with the rudiments of mining, and with the simplest principles of geology and mineralogy. Before the discovery of New Almaden, some two or three rude efforts, I am told, had been made near Monterey to extract silver from the veins in that neighborhood, without much success. But with that exception there had been no mining in the remote territory of Upper California; and, as we have seen, it was considered of so little promise that no Commission was sent to it, as directed by the decree of 1843, to search for veins of cinnabar.

Jurisdiction of the Alcalde before whom Castillero made the Registry.

Another objection urged by the Government against the validity of our title, is, that the Alcalde to whom Castillero presented his written statement, had no jurisdiction over the matter of registry.

A very brief investigation of the law will satify the Court that in this objection there is no force.

By all the laws of Spain and Mexico, relating to the Registry of Mines, that matter is referred to a Court of Justice; by some laws to a Special Mining Court, and by others to Courts of general jurisdiction.

The 4th Art. of the Law of January 10th, 1559, commands the discoverers of mines to register them before a Royal Notary, or before the Court in whose jurisdiction such mines may be.—*Halleck's Col.* 12.

The 16th Art. of the next law, that of 1563, commands discoverers to register their mines before the Court within whose jurisdiction it may be situate, and in the presence of a Notary.—*Halleck's Col.* 22.

The Ordinances which followed, (those of 1584) Art. 17, require the discoverer to register his mine before the Mining Court [*Justicia de Minas*] within whose jurisdiction the mine may be situate, in the presence of a Notary, and within sixty days from date of registration to send an authenticated copy of said registry to the Administrator General if there be one in the district, if not, then to the Administrator of the Partido of the district in which the mine is situate, and all this under penalty of forfeiture of the mine. —*Halleck's Col.* 76.

"But," says Gamboa, commenting on this Ordinance, "inasmuch as there are not general or particular Administrators in the Indies, although there are Governors, Mayors, and Chief Alcaldes in the mining districts, and likewise Mining and Registering Notaries, the provisions of these Ordinances ought in this, as in all other respects, to be maintained and observed in that Kingdom, agreeably to the rules of its municipal laws, as stated by us above. For it is a great object to guard against the serious consequences which might otherwise ensue, from the importance of the interests

which are involved in mining; the litigation being principally concerning mines yielding rich produce."—1 *Heathf. Gamboa*, 145–6.

Thus stood the law for two hundred years, the great era of successful mining in New Spain. By such a vast experience was the wisdom of some of its provisions tested, and the defects of others exposed.

In 1783, a new Mining Code was made—then called "The Mining Ordinances of New Spain," and since the independence of Mexico, "The Mining Ordinances."

In the year 1776, the miners of New Spain, having been erected "into a formal body like the *consulados* of commerce," the management and direction of almost all matters pertaining to their business was by the Ordinances of 1783, entrusted to their charge. This was especially the case with regard to matters of jurisdiction. Special Mining Courts were erected, before whom mines were to be registered, and who were invested with jurisdiction over all questions of property in mines.

The Ordinances proceed in this wise:

In the first place, the owners of mines, in each mining district of New Spain, (and these districts are sometimes called *Reales*, sometimes *Asientos*, sometimes *Lugares*, sometimes *Territorios*) were required to enroll themselves as miners of that place, in a register to be kept by the Judge and Notary of each Mining District. The suppliers of mines, that is, persons who furnish capital for working them, called *Aviadores;* the owners of mills, and the owners of establishments for grinding and reducing ores, were required to enroll themselves in the same manner. The persons so enrolled were the individual Corporators of the Important Body of Mining of New Spain; and elected the Judges of the Special Mining Courts of First Instance, which were erected by the Ordinances of 1783. —*Vide Title II, Halleck's Col.* 201.

These special courts of first instance, that is to say, of original jurisdiction, were—

1st. The Tribunal General, and 2nd, The Mining Deputations.

The officers of the Tribunal General were elected every three years, by electors sent for that purpose by the enrolled miners of of each District, to the City of Mexico.—(*Title I, Halleck's Col.* 193.) This Tribunal took cognizance of all matters pertaining to

the great Corporation of Miners, which relate to its administration, direction, and management. It was moreover a special Mining Court, exercising jurisdiction over questions of discoveries, denouncements, *pertenencias*, measurements, etc., within the district of twenty-five leagues around the Capital of Mexico.—*Tit. III, Arts.* 1, 2, *Halleck's Col.* 207.

The Mining Deputations elected by the enrolled miners of each district, were also special Mining Courts, exercising within their districts the same "exclusive contentious jurisdiction," granted as above stated to the Tribunal General.—*Tit. III, Arts.* 4, *Halleck's Col.* 207.

The Courts of Appeal from the Tribunal General and from the Mining Deputations, or, as they are called in the Spanish law, the courts of second and third instance, were so numerous and complicated, and were so frequently changed by subsequent legislation, that I will not undertake to describe their organization. Tit. III, in Arts. 13 to 37, treats of them.—*Halleck's Col.* 211 to 220.

But it is proper to add, that as early as 1793, the Tribunal General was erected into a Court of Appeals, and that the Territorial Judges, and the Judges of mines, and also the Intendants, shared with the Mining Deputations the cognizance of causes in first instance. (*Halleck's Col.* 356, 369.) We perceive therefore that the courts which took cognizance of mining cases, were composed partly of officers belonging to the corporate organization of the Body of Mining of New Spain, and partly of the ordinary Judges of the kingdom, such as exercised ordinary jurisdiction, as opposed to special. The system was complicated, mixed, and continually changing.

The Ordinances of 1783, besides giving to the important Body of Mining of New Spain their special Mining Courts, also created a Bank of Supplies for the purpose of assisting poor and meritorious discoverers in developing their mines, and also established a National Mining College for the instruction of youth in all matters relating to that important branch. The Bank and the College were placed under the administrative power of the Tribunal General.

For all these various objects an endowment fund was created, called the *real de Mineria*, being a certain per centage on the gold and silver coined in the mint at Mexico. The expenses attending

the building of the College, says Alaman in his history of Mexico, and loans made to the Bank of Supplies, soon brought the Endowment Fund in debt, and the debt continues to this day. Mr. Bassoco, one of the witnesses in this case, it will be remembered, represented the creditors of the Endowment Fund in the *Junta de Fomento*. In 1843 the fund was in debt to the extent of $5,000,000.

We now understand the nature of the special Mining Courts of first instance established by the Ordinances of of 1783.

By Tit. VI., Art. 4, the discoverers of mines were required to present themselves, with their written statement, before the Mining Deputation of the district in which their newly discovered mines were situated, or before the one nearest, if there should be none there.—*Halleck's Col.* 224.

Thus stood the law until the independence of Mexico and the adoption of the Federal Constitution of 1824, which established a Federal Republic.

Its effect, unlike that of our own, is not to make one out of many, but many out of one. It breaks up a vast country, which for centuries had been comprised in two or three Provinces of the Spanish Empire, into no less than nineteen States and four Territories, Upper California being one of the latter. It distributes the great fund of power belonging to one independent nation among the States which it called into being; and starting from a point diametrically opposite to that whence we began, it arrives at a form of government very much resembling our own. In fact, the Mexican Constitution of 1824 is almost an exact copy of that of the United States. And especially is this the case with the Judicial System. Article 123, White's Recop. 404, is in these words: "The judicial power of the Union shall reside in a Supreme Court of Justice, in Circuit and in District Courts."

The jurisdiction of the Supreme Court is defined in Tit. V, sec. 3, White, 405.

That of the Circuit Courts in same title, sec. 5; and that of the District Courts in the sixth section. The most cursory examination of these sections will convince the reader that no jurisdiction is conferred on any of the Federal Courts, in the least degree approximating that of taking cognizance of questions relating to the discovery, registry, or measurement of mines.

All the old Spanish laws relating to the judiciary, and establishing Courts either of general or special jurisdiction, were therefore repealed by the Constitution of 1824; and among them, of course, the Special Courts called Mining Deputations. The States might permit them to continue, or reëstablish them by their own laws, while the General Government could not.

But there was left in the Federal District, embracing the city of Mexico, the old organizations of the Consulado of Commerce and the Tribunal General of Mines, with the National College of Mining and the Bank of Supplies. Over this Federal District the General Congress exercised the attributes of the legislative power in a State. (Tit. 3, sec. 5–28, Const. 1824, 1 White's Recop. 395.) And besides, on the Federal Government had fallen much of the business of the old Viceroyalty of New Spain, in matters essentially national—such, for instance, as the debts due by the Body of Miners of New Spain and the management of the National College of Mines.

Hence we find that for those old institutions and corporations which had their heads and chief officers in the Federal District, it was necessary for the Federal Congress to legislate—for that body only could legislate for the Federal District—and within that District, as well as elsewhere, these old courts and corporations exercised their powers and enjoyed their privileges.

Special tribunals, called *Consulados*, for the determination of all commercial questions, were established in New Spain at a very early date, and in 1798 the Ordinances of Bilboa were made their rules of decision. On the establishment of the Federal Government, these special Courts were deemed incompatible with the Constitution, and were suppressed by decree of October 16th, 1824.

Article first of that decree declares that the *Consulados* shall cease in all that relates to the Confederation. The qualifying words, *in all that relates to the Confederation*, were evidently intended to signify that, in no other respect could the Federal Congress legislate on the matter.

Article sixth provides that suits pending in the *Territories*, on commercial contracts shall, for the present, be continued and concluded by the Alcaldes or *Jueces de Letras*, etc. This provision

was limited to the Territories, because they were under the direct Government of the Federal Congress.—3 *Col. de Decretos*, 110.

On the twentieth of May, 1826, the Tribunal General of Mining shared the fate of the *Consulados* of commerce. A decree of that date, article first, declares: "The Tribunal General of Mining must cease according to the General Constitution in so far as relates to the administration of justice with which it is charged." (4 *Col. de Decretos*, 55; *Halleck's Col.* 409.) This decree was limited to the Tribunal General of Mining, because it existed in the Federal District, where its jurisdiction was exercised. The decree did not mention Mining Deputations, because the *asientos* or *reales* of mines, which formed the respective *Territorios* in which they exercised jurisdiction, were within the States—and the State Congresses alone could legislate in regard to them—over them the powers of the Federal Government had entirely ceased. As Federal Courts they became entirely extinct when the Constitution of 1824 was framed and adopted. If special tribunals similar to the old mining deputations existed in the States, it must have been by virtue of State legislation.

This is a perfect refutation of the argument made by the Government in the various tribunals before which this case has been litigated, to the effect that while the decree of May 20th, 1826, entirely repealed all the laws which conferred judicial power on the Tribunal General, it did not in any manner affect the Mining Deputations as special Mining Courts.

If authority were necessary to sustain a proposition so very clear as the foregoing, we might refer to the writings of some of the most prominent Mexican Jurists.

Peña y Peña, in his *Practica Fronese Mexicana*, tomo 2, says: "The Courts of Mining (*Jusgado de Mineria*) were also, by another Mexican decree, article first *del decreto de* 20 *de Mayo de* 1826, declared to be incompatible with the General Constitution, as was also done with the Courts of the *Consulado*," and it was provided that "suits in mercantile matters should be decided by Alcaldes, justices," etc., p. 271. He says the cause of this was "the many and grave objections against *special tribunals*, and particularly against those of commerce, on account of the abuses inevitable to the exercise of such jurisdiction." In another place he describes

the suppression of the *Consulados* and the transfer of the jurisdiction of mercantile matters to the ordinary Courts (*los jueces ordinarios*) and closes the subject in the following words: "What we have said of the tribunal of the *Consulado* in mercantile matters, is also applicable to the tribunal of mining in matters of that branch." (Pages 601–603.) That is, Mining Courts were abolished, and the jurisdiction of mining matters recurred to the ordinary Courts. Again, in speaking of the Spanish Constitution of 1812, he says it did not abolish the special Mercantile and Mining Courts, and "they thus continued with us *till they were abolished by our Mexican decrees.*" (P. 696.)

Peña y Pena's book was published in Mexico in 1835.

Strongly corroborative, if not completely decisive, of the correctness of this view of the effects of the law of May 20th, 1826, is the authority of La Pascua, the learned author of "Febrero Mexicana." This work is founded on the Spanish Febrero of Tapia, but a great portion of it is either rewritten by La Pascua, or so changed as to make it conform to the existing laws and practice of Mexico. That part relating to mines is entirely rewritten, and the substance of the Articles 4, 5, 7 and 8 of Title VI of the Ordinances of 1783, is given with important modifications. Instead of saying in article 4th, that the discoverer shall present his writing of discovery for registry to the mining deputation ("*ante la deputacion de mineria*,") as in the original Ordinance, he says it shall be presented "to the Justice of the place (*al juez del lugar;*") and instead of requiring one of the deputies personally to inspect the mine and give the possession, (*pase personalament uno de los diputados*, &c.) as in the original text, he alters it so as to read that the Justice shall do this, (*pasará personalament el juez*, &c.). And the same throughout, wherever the word *deputacion* is used in the Spanish Ordinance, La Pascua in the *Febrero Mexicano* substitutes the word *Juez*. (Vide lib. 2, tit. 1, cap. 2, secs. 20, 21 and 22.) This shows that when La Pascua wrote (1834) there were no mining deputations, or that if there were any under State laws, they were not general in Mexico, and that the ordinary Justice (*juez del lugar*) exercised the jurisdiction of the former deputations. In another place he gives the organization of the judiciary of Mexico, but the Mining Courts are not mentioned in

the list of *tribunales especiales.—Vide appendix to lib.* 3, *tit.* 2, *chap.* 2.

We may, therefore, consider it certain, that under the political system of Government established by the Constitution of 1824, there could be no Federal Courts existing by express law, or by tacit adoption, other than such as are authorized by the Constitution. What those are I have already shown. Among them clearly could not be either the Tribunal General of Mining, or the *Consulados* of Commerce, or the Mining Deputations.

The Constitution of 1824 was subverted by that of 1836—the Federal system, with all of its consequences, was abolished, and replaced by the Central or Departmental system. The sovereign powers of the several States were taken from them, and the States themselves became Departments only of the nation.

One of the earliest acts of the new Government, thus centralized, was the law of Congress of twenty-third May, 1837, which suppressed all special Courts, (*jusgados especiales*) and directed that all proceedings and causes before them be transferred to the Courts of ordinary jurisdiction. The special tribunals referred to could have been only such as had been created by the States; for, as we have seen, there were no Federal Courts exercising special jurisdiction then in existence.

With the destruction of the Confederation, and the establishment of a Central Government, returned the old forms of the monarchy, and the revival of special Courts. By law of November 15th, 1841, provision was made for the organization of mercantile tribunals, and on second December, 1842, the special Mining Courts provided for by the Ordinances of 1783 were revived.

This is the important ordinance to which I have referred in connection with the testimony of the President and members of the *Junta de Fomento* on page 167 of this argument. I have there shown for what purposes that Junta was created. With the remark, that it occupied, to some extent in the new system, the place of the Royal Tribunal General in the old one, I now proceed to consider the special Mining Courts which it created. They are treated of in Title IV (*Halleck's Col.* 441) in these words.

"*Of the Administration of Justice in matters of Mining.*

"Art. 24. The Governors of Departments, in concert with the Departmental *Juntas* and with the previous approval of the Supreme Government, will establish in each of them the number of Courts of First Instance which are required within their limits.

"Art. 25. Each Court shall be composed of three territorial Deputies elected in the manner which is prescribed in the old Ordinance of Mining; and of these three individuals, the first shall be the President of the Court, and the other two Associates (*Colegas*).

"Art. 26. Each one of these Courts shall exercise, within its territory, the executive and economical powers given by the old Ordinance of the branch, (*ramo*) and in judicial matters they shall conform to the same Ordinance, so far as relates to the simplicity and brevity of their proceedings."

Now this law, it is apparent, does not confer a new jurisdiction on Courts already in existence and organized, but directs the Governors of Departments, in concert with the Departmental *Juntas*, and with the previous approval of the Supreme Government, to establish such a number of said Courts as may be required in each Department. Proceeding in the execution of their duty, the Governors and Assemblies would have to fix the limits and the number of the Mining Districts in which the Mining Courts were to be established, and report to the Supreme Executive. His approval given, then the miners, millers, owners of reducing establishments, etc. in each district, would be required to enroll themselves, and elect Mining Deputies on a day appointed. All this would have to be done before these Courts, with their officers, could be organized. Meantime, how would discoveries be registered? What Courts would exercise the jurisdiction in mining matters which would belong to the new ones when they came into existence? Was there to be a *hiatus*—a failure of jurisdiction all that time? By no means. The Spanish and Mexican jurisprudence, as we shall see, carefully guarded against such an evil.

Again, if it be true that after the decree of December 2d, 1842, no mines could be registered except before one of the Mining Courts of First Instance therein provided for, then it is clear that in Cali-

fornia, under that decree, a mine never could be registered; for the members of each Mining Court were to be elected by the enrolled miners, millers, and owners of reducing establishments of the district over which the jurisdiction of the said Court extended. Now, as is well known, there was not a mine-owner, nor the owner of a mill for grinding ores, nor the owner of a reducing establishment in California in 1842—how then could there ever be a mining deputation in California before which registry might be made?

Of what had been done by the several Departments towards carrying into existence the new system of Mining Jurisprudence ordered by this Decree, from its date to the month of November, 1846, we have a succinct account in the report of the *Junta de Fomento*, to the Minister of Relations in the last-mentioned month. It will be found in the 3d vol. of the Transcript, p. 1714.

From this it appears that Mining Deputations had been established in the Departments of Mexico, Zacatecas, Jalisco, San Luis Obispo, Sinaloa, Chihuahua, Coahuila, Michoacan, Aguas Calientes, Guanajuato, Oajaca, Sonora, Durango.

And none, in the Departments of Chiapas, Tabasco, Tamaulipas, Vera Cruz, Yucatan, Nuevo Leon, Puebla de los Angeles, Queretero, Californias, Colima, New Mexico.

It is then clear, and I do not suppose it will be denied, that there never was, in Upper California, any Mining Deputation or Special Mining Court, having jurisdiction over the registry, denouncement or measurement of mines.

The question then recurs, before what officer ought Castillero to have registered his mine in November and December, 1846.

The answer is, he ought to have registered it, as he did register it, before the Alcalde of First Nomination of San José Guadalupe.

It is a general principle of Spanish law that, where new officers are created to perform certain duties or exercise certain powers, until these new officers are appointed and installed, the old officers, their predecessors, continue to exercise such powers and perform such duties. A contrary rule would produce an interregnum in the affairs of government. So, also, old laws continue to be observed when new ones are not received or executed in any pueblo or province—"Que las leyes antiguas quedan en observancia, cuando las nuevas ne se llegan á recibir ni ejecutar en un pueblo ó provincia."

Among other authorities, *vide* Gutierres, cuestiones canonicas, lib. 1o, cap. 8; Covarrubias, cuestiones practica, lib, 2, cap. 16, numero 6, y seq.

The old Code 1563, Art. 16, (Halleck's, 22) and the new Code, Art. 17, (Halleck's 76) require the person who registers a mine to notify the Administrator of it, under the penalty of forfeiture; and yet says Gamboa: "Inasmuch as there are not any general or particular Administrators in the Indies, although there are Governors, Mayors, and Chief Alcaldes in the mining districts, and likewise Mining and Registering Notaries, the provisions of these Ordinances, ought in this, as in all other respects to be maintained and observed in that Kingdom, agreeably to the rules of its municipal laws, as stated by us above."—1 *Heathf. Gam.* 145.

But there is another general principle in Spanish and Mexican jurisprudence which fully authorizes the practice alluded to, and gives it the sanction of law. The principle is, *that where jurisdiction of any particular matters is given exclusively to a special tribunal, in the absence of such special tribunal, such matters revert to the ordinary tribunals, without any law or order being requisite to give jurisdiction* DE NOVO. Thus, mercantile and admiralty jurisdiction, in places where there are no mercantile tribunals, or Courts of Admiralty, belong to the ordinary Courts, (*justicias ordinarias*) that is, to Alcaldes and Courts of First Instance, without any special law being requisite to give such jurisdiction. This principle is clearly laid down and announced in very positive terms by Spanish and Mexican law writers. Among others we would refer to Salgado's Treatise on *Retencion de Bulas*, parte 2d, Chap. 12, numero 53 y siguientes; Castillo's *Controversias*, tomo 6, Chap. 146; Agustin Barbsa's *Comentario*, Chap. 5 de los decretales de arbitris; and Peña y Peña's *Practica Forense Mexicana*, tomo 2, pp. 53, 421, 371. This question of jurisdiction is so admirably discussed by the last-named and most distinguished Mexican jurisconsult, that I will copy a few paragraphs at length.

"The ordinary jurisdiction is the most commendable of all, for it is the most ancient, the most ample, the most advantageous, the fountain and mother of all the rest; that which is liable to no motive of partiality; that which therefore ought not to be

strictly construed, and, in case of doubt, is to take precedence of all others." P. 53, Sec. 11.

"All exceptions and all privileges are odious from their very nature; and *special* tribunals being a real exception from the *fuero* of ordinary jurisdiction, often granted as a favor and privilege to corporations and particular classes of persons, without serving as a convenience, but rather as a positive detriment to public order, it is easy to understand how justly this hatred has arisen against them, particularly as they have received more attention and care than all the ordinary tribunals." P. 421, Sec. 81.

"A *special tribunal* is one created for the cognizance of a certain class of causes or of persons. It is called *special* in contradistinction to the *ordinary*, which is established for every class of cases and of persons without distinction; so that every special tribunal comes to be an exception from the ordinary tribunals, for which reason some authors give to special tribunals the name of *tribunals of exception*. Hence it is, that the exception being removed, the general rule remains in force; so also, a special tribunal being extinguished, all its jurisdiction returns to the ordinary tribunals, as to its source, and reverts to them by the very nature of things, *without any necessity that the authority of the suppressed tribunal should be given to them de novo*. It is also deduced that, as every privilege is odious in itself, so also is every special tribunal which introduces a privileged forum. And lastly, it is deduced, that, as in order to introduce an exception, it is necessary there should exist the most powerful reasons for suspending the operation of the general rule, so likewise to establish a special tribunal, there should exist the most urgent reasons, founded in nothing less than the well-being of society." P. 371, Secs. 1 and 2.

These authorities, and especially the reasoning of Peña y Peña, seem to me perfectly decisive of this question of jurisdiction; for on the extinguishment of the *special* tribunals for mining, their jurisdiction reverted to the *ordinary* tribunals of the country, and these latter must continue to exercise such jurisdiction till new *special* tribunals are actually organized and established in their place. It is not sufficient that the law should *authorize* such organization, but the special forum must be actually established and put into operation. All the presumptions are in favor of the ordinary

forum or the general rule ; and the alleged necessity of the exception must be closely examined, and the authority of the special forum most strictly construed.

We have already shown that Articles 1st, 2d, 3d and 4th, of Title 3, of the old Mining Ordinance of 1783, (upon the precise words of which the opposite counsel rely in their objection to Castillero's registry) were most materially changed immediately after the issuing of that Ordinance ; that these articles are of the nature of *political laws*, relating to political organization and the power of officers, and that consequently they ceased to have any force after the independence of Mexico ; that even admitting them to be in force after the change of government, they were abolished by the Decree of May 20th, 1826 ; and if not then, certainly by the Decree of May 23d, 1837, which abolished all special tribunals ; and that, as no Mining Tribunals were ever organized in the Department of Californias under the Decree of December 2d, 1842, the jurisdiction of such matters belonged to Courts of ordinary jurisdiction (*justicias ordinarias*). Now, what Courts in California exercised this ordinary jurisdiction? This question is easily answered.

On the twenty-third of May, 1837, the very day on which all special tribunals were suppressed, Congress passed a decree organizing a judiciary for each of the Departments of Mexico, composed of Justices of the Peace, Alcaldes, Judges of First Instance, and a Superior Tribunal divided into courts of Second and Third Instances. The jurisdiction of Justices of the Peace and Alcaldes was limited to municipal matters, arrests, fines, verbal process, suits of conciliation, and litigated cases not exceeding $100. But the Courts of First Instance had general original jurisdiction of all judicial matters within the limits of their districts, the parties having the right of appeal in certain cases to the Courts of Second and Third Instances. Such was the general system of the new organization; but as proper persons could not be found in California for the establishment of regular Courts of First Instance, Alcaldes, in addition to their other functions, were here authorized to supply the places of Judges of First Instance, and to exercise the same powers and jurisdiction as such Judges, and could supply the want of a notary by acting with two assisting witnesses. Hence we find

that in California all deeds of sale, mortgages, acts of juridical possession, etc., of land, were made and registered in the Alcalde's Court, his office being, in fact as well as law, the only office or court of registry in the Department. And for the same reasons, his office or court was the proper and only place to register discoveries, denouncements, sales and leases of mines in his district, and he was the proper and only officer who could mark out the *pertenencias*, and give juridical possession of such mines, or take original jurisdiction of mining causes.

Again, in the decree of March 2d, 1843, respecting the judicial organization of May 23d, 1837, it is stated that in the Californias, New Mexico, and Tabasco, there had been no Courts of Second and Third Instance established, and that in those Departments the primary courts (of First Instance) should proceed with the causes properly before them, even to the final decision of Last Instance; and in Article twenty-eight, the Governors of these Departments are ordered "*to take care that justice is punctually and completely administered in First Instance by Judges of that grade, if there be such, or by Alcaldes and Justices of the Peace.*"

Now, how could justice be *completely and punctually administered* in California, if in the absence of special tribunals the ordinary courts of the country could take no cognizance of such matters? In the absence of a mercantile tribunal, how could merchants collect or negotiate bills of exchange, enforce commercial contracts, charter parties, bottomry bonds, etc.; or mariners collect their wages? And in the absence of mining tribunals how could mines be registered or worked, or mining causes decided? If this could not be done by the ordinary courts of the country, how could justice be punctually and completely administered?

There will be found in this record no less than eight instances of the registry of mines before the Alcalde of the jurisdiction of San José Guadalupe, the same before whom Castillero registered his; and a careful search in the archives of that Court would very probably disclose several others, for it is known that others were made. On page 80 of this argument I have collected and referred to those in the record. The usage and custom of the Mexican States and Departments in regard to the registry and denouncement of mines before the ordinary judicial tribunals, is

proven by Danglada.—*Tr.* 28; *de Leon*, *Tr.* 30; *Brodie*, *Tr.* 135; *Villegas*, *Tr.* 133.

It will also be remembered that Mr. Larkin, American Consul at Monterey, in a letter to Mr. Buchanan, describes the process of acquiring title to a mine by informing the nearest Alcalde of the discovery.

And referring to page 73 of this argument, the Court will find a letter from Governor Mason to Alcalde White of San José, dated June 19th, 1848, in which the Alcalde's jurisdiction in registry is spoken of as an admitted thing.

But there is another principle of law which sets at rest all question as to the jurisdiction of the Alcalde in his proceedings in registry. It is this, in the language of Chief Justice Marshal: "Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign country must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations its Sovereign could not confer, however available its sentences may be within the dominions of the Prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon the principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all."—*Rose* v. *Himely*, 4 *Cr.* 276.

We will see that the Mexican Government, so far from questioning the jurisdiction of the Alcalde in admitting Castillero's registry and giving him possession of this mine, never expressed the least doubt on that point, but proceeded to confirm his grant of three thousand varas, wherein he exceeded his power, and made to Castillero another grant of two square leagues by title in colonization, to supply him with wood for his furnaces.

Section III.

On the effect of the Acts of the Supreme Government in confirming those of the Alcalde.

The Alcalde not only put Castillero in the possession of the mine, but also granted him three thousand varas in all directions from the mouth of the mine.

By virtue of the registry of the mine, and of its being owned in partnership, we claim seven pertenencias.

The grant of the mining possession of three thousand varas in all directions from the mouth of the mine, and all else that was done in the registry of the mine, was confirmed and ratified by the President of Mexico, on the recommendation of the Junta de Fomento, on the twentieth of May, 1846.

I suppose that the United States will here renew their objection to this position, on the grounds taken in the argument of the equity cause—which are, *first*, that no such approval or confirmation was in fact given; and *secondly*, that if the President of Mexico had intended to do so, his action would be a nullity for want of power.

Let us examine these two objections in their order. And first, as to what was really done by the Supreme Executive in confirmation of the acts of the local authorities of California.

On the sixth of May, 1846, Castillero presented himself before the Junta de Fomento y Administrativa de Mineria, while in session; gave a verbal account of his great discovery in California, and was asked by the Junta what help or assistance he required from the Government for the prosecution of his brilliant mining enterprise, which promised such incalculable benefits to the nation. In reply, he made a verbal statement, when he was requested by the Junta to put it in writing.

Accordingly, on the twelfth of May, 1846, he handed in to the Junta his proposals in the desired form. They will be found on page nine of this argument.

On the fourteenth of May, 1846, the original proposals were transmitted to the President of Mexico, enclosed in a communication from the Junta de Fomento to the Minister of Justice, strongly

recommending them, and urging the President to accept them. The Junta's letter will be found on the eleventh page of this argument.

On the twentieth of May, 1846, the President of Mexico, regarding Castillero's propositions, strongly urged upon him as they had been by the Junta de Fomento, as having received the assent of that body, called it an agreement and approved it in all its parts, and a decree to that effect was written on the margin of the letter from the Junta which enclosed Castillero's petition. The decree is in these words:

"May 20th, 1846. Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations, for the proper measure of his office, with the understanding that the Supreme Government accedes to the petition." Signed with the rubric of Becerra, Minister of Justice.

On the same day, this decree was communicated to the Junta de Fomento in an official letter from the Minister of Justice, which will be found on the fourteenth page of this argument. And it was also, on the same day, communicated to the Minister of Relations, who was directed to take the proper measures in regard to the grant of land. This last letter is given on page fourteen of this argument.

Now what were Castillero's proposals to the Junta de Fomento, which, having received their assent, were regarded by the President of Mexico as an agreement, which he approved in all its parts.

Those parts of the proposed contract with which we are concerned in this case, are the following.

"Seventh. The Junta shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine by the local authorities of California in the same terms as those on which I now hold it.

"Eighth. It shall also represent the advantage of there being granted to me as a colonist, two square leagues upon the land of my mining possession; with the object of being able to use the wood for my burnings.

"Ninth. For the compliance with this contract I pledge the mine itself and all its appurtenances.

"The subscriber submits this request to the deliberation of the

Junta, which, if accepted, may be made into a formal contract, and made legal in the most proper manner.

"God and Liberty. ANDRES CASTILLERO.

"*Mexico*, *May* 12*th*, 1846."

In regard to the eighth proposition, the subject of discussion just here, nothing can be clearer than its terms. It asks for the confirmation of his mining possession, given by the local authorities of California, in the same terms as those on which he then held it. And what was the nature of that possession whose confirmation he asks? The preamble to his propositions describes it fully. He there informs the *Junta de Fomento* that he "has denounced and taken possession of, not only the said mine named Santa Clara, but also of an extent of three thousand varas in all directions from said point." And it will be observed that the *Junta de Fomento*, in their letter of the 14th of May, 1846, to the Minister of Justice, enclosing the original of Castillero's proposals, dwell with particular force upon this eighth proposition, and present to the Government many reasons why it should be acceded to. It is therefore altogether improbable that the President of Mexico, with Castillero's very plain proposals before him, accompanied as they were by the letter of the *Junta de Fomento*, which explained them all, and treated of the eighth with great particularity and urgency, should have caused his Minister of Justice to write a decree on the margin of the *Junta's* letter, *granting all that was proposed*, and to despatch a formal communication to the *Junta* informing them that he *approved* the agreement made with Castillero *in all its parts*, if it was really the intention of the President to withhold his approval from one of the most important and prominent parts of the proposed contract.

And again, to show how fully the President understood Castillero's proposals, and the effect of giving his approval to them *all*, we find him in his decree neglecting none of them, but on the contrary, directing that proper orders be issued to the Minister of Relations in regard to the grant of two leagues of land. Moreover, after informing the *Junta* that he has approved the agreement made with Castillero in all its parts, he is careful to tell them that he has issued the proper orders to the Minister of Relations touching the

grant of land. This was done in order that the *Junta* and Castillero might know what steps had been taken in another Ministry to carry the Government's approval into complete effect.

When the President of Mexico tells the *Junta de Fomento* that he has approved in all its parts the agreement which they have made with Castillero, what does he mean? To what *agreement* does he refer? Evidently, to the contract which Castillero *proposed* to the *Junta*, and which having received their assent, as shown in their letter to him, he treats as an agreement, already made, as far as the *Junta's* power extended, and awaiting only the action of the Government to approve or disapprove it, in whole or in part. Castillero proposed to the *Junta* only one contract, consisting of nine propositions. Those nine propositions, assented to by the *Junta*, formed the agreement which they made with Castillero, and which the President approved in all its parts; that is to say, in all its nine propositions.

To my mind, nothing can be clearer than this conclusion. I have heard much argumentation to the contrary, but it was so weak and sophistical that I cannot now remember it with sufficient distinctness to repeat it, even were I inclined to devote further time to its refutation.

Supposing then, that the President of Mexico did approve the eighth article of the contract proposed by Castillero to the *Junta de Fomento;* what did Castillero gain by it? The Court will remember that this eighth proposition was to the effect, that the Supreme Government should confirm the possession of the mine, which had been given to Castillero by the local authorities of California, as he then held it; and that in the preamble to his propositions, he informs the *Junta*, that he "has denounced, and taken possession of, not only the mine of Santa Clara, but also, of an extent of three thousand varas in all directions from said point." In this assertion, he is fully borne out by the record of the act of possession, with which the Court is familiar. That record shows, that the Alcalde not only gave Castillero juridical possession of the mine, but also granted him 3000 varas in all directions.

The question then recurs: What is the nature of the grant of three thousand varas; is it a mining grant, that is to say, a

grant of all the minerals within the tract? Is it the same as a large mining pertenencia of the size of the tract? Or, was the tract granted as a site for a hacienda, or reducing establishment, and for the wood and water which it afforded?

On this point there is some obscurity, if we regard the views of some of the original owners of the mine, as to the nature of their title: James Alex. Forbes, and the two Robles, and José Castro, as we have seen, considered the grant of three thousand varas as intended for reducing establishments, and as the source whence a supply of wood and water might be drawn. But the owners, with the exception of Forbes, were ignorant and illiterate persons, and living as they all did in a country where mining was unknown, it is not surprising that they should have been mistaken as to their own rights and titles. And to a person with my own experience, derived from the management of this case, remembering all the legal positions taken at various times by learned counsel who have contested this title, sometimes on behalf of the Government, sometimes on behalf those who have asserted title to the mine under colonization grants, it would appear in the highest degree surprising if Forbes, and the two Robles, and José Castro, had not preceded in error the cultivated and well practised minds of the learned counsel who have addressed themselves to the construction of these Ordinances.

I therefore resort to the construction which the *Junta de Fomento de Mineria* put on this mining possession of Castillero's, given by the Alcalde, and confirmed by the President of Mexico. Their construction is entitled to greater consideration than would attach to it as the mere opinion of the *Junta*, however able the gentlemen composing that body, for the reason that it was communicated to the President in the *Junta's* letter of the fourteenth of May, 1846, and was therefore fully understood by him when he confirmed the possession. The *Junta* speak of this mining possession as *pertenencias;* that is to say, they consider it a mining grant, as distinguished from a grant of the surface.

"It remains, then, to show to your Excellency," say the *Junta* to the President, "that although the possession given to Señor Castillero by the local authorities of California has not been in conformity with the Ordinance, inasmuch as there have been granted

him '*pertenencias*' to the extent of three thousand varas, which are equivalent to fifteen 'pertenencias,' agreeably to the second article of the eighth title; yet it is necessary to consider that he has in his favor the qualification of being discoverer *of an absolutely new hill, in which there was no mine open*, and to such there is granted in the first article of the sixth title *three* '*pertenencias*,' *either continuous or interrupted; and if he shall have discovered other veins, one* ('*pertenencia*') *in each of them.* He has also in his favor the circumstance that he works it in company with others, to whom there is granted that without prejudice to the right which they may have by the title of discoverers, when they are such, they may denounce four new pertenencias, even though they are continuous, and in the same direction," etc.

With this understanding of the Alcalde's mining grant to Castillero, the *Junta* recommend its approval by the President; and so understanding it, he confirmed it.

But according to my understanding of Castillero's right, the *Junta de Fomento* made a mistake in their computation of the number of pertenencias contained in the mining grant. The grant is for three thousand varas in all directions from the mine, which, if not understood to be a square of six thousand varas to a side, must be one of three thousand to a side. Now the *Junta* were evidently wrong in their reckoning when they say that within the limits of that mining possession there are only fifteen *pertenencias*, for a *pertenencia* being always two hundred varas long, and varying in width between one hundred and two hundred varas, the length of fifteen of them will be three thousand varas. Therefore, three thousand varas square, allowing to a *pertenencia* its greatest width, would contain fifteen times fifteen *pertenencias*.

In their calculations, the *Junta de Fomento* made a mistake. But they were furnished by Castillero, in the preamble to his propositions, with all the necessary *data* for a correct estimate, and the President had the same before him when he confirmed the possession—and what he confirmed was not the mining possesion as estimated in *pertenencias* by the *Junta*, but as it had been given by the Alcalde.

This point I think I have made sufficiently clear.

I will next consider *the power of the President of the Republic to confirm the acts of the Alcalde.*

In considering the powers of the President I shall leave out of view his revolutionary, usurped and extraordinary powers, [for such, like most Mexican Presidents, he possessed, as I shall clearly show in my argument on the validity of the two league grant] and confine myself solely to the power conferred on him by law.

By the Ordinances of 1783, and by the laws, usages and customs of Mexico, two kinds of mining grants were recognized—ordinary and special.

Ordinary grants, of the dimensions fixed by law, were made by the law itself to the discoverer. These I have already explained. From such a source was the title of Castillero and his partners to seven *pertenencias* derived.

Extraordinary or special grants were made, according to the special circumstances of each case, by the administrative branch of the Government, represented in New Spain by the Viceroy, and in Mexico by the supreme Executive Power.

The mining possession of three thousand varas given to Castillero and his partners by the Alcalde and confirmed by the President of Mexico, affords an instance of a special or extraordinary grant.

It is obviously to the interest of every nation whose principal wealth consists in minerals and whose principal business is mining, to provide the means whereby there may be granted to persons who will undertake great, hazardous and expensive mining enterprises, a larger space of mining ground than under ordinary circumstances would be required. In many instances mines are abandoned, they become inundated, their walls fall in, and districts which yielded at one time immense wealth, and were the thriving sites of cities and villages, are ruined and deserted. There remains a tradition, say, of a great outbreak of water in some mine, which inundated all the mines on the vein, and rendered further work impossible. An enterprising company, believing that an attempt to restore these mines is worth the outlay of vast capital and the patience of years, desire to undertake the work. But not willing to encounter all the risks of failure without an adequate prize in view, the proper authority is requested to grant them a large tract of mining ground, containing many more *pertenencias* than the ordinary discoverer or

the ordinary denouncer of an abandoned mine would be entitled to.

Cases of this kind are provided for by the Ordinances of 1783. *Vide Tit. VI, Art.* 17, *Halleck's Col.* 229, *and Tit. XI, Art.* 7, *Halleck's Col.* 252.

"Art. 17. I prohibit any one who is not the discoverer from denouncing two contiguous mines on the same vein; but I permit any person to acquire and possess one by denouncement, and another, or more, by purchase, gift, inheritance or other just title whatsoever. And I further declare, that if any person desires to reëstablish (*habilitacion*) many mines inundated or decayed, or any other considerable enterprise (*empresa*) of this kind, and for this purpose, desires that there be granted to him by denouncement many *pertenencias*, even though they be contiguous and on the same vein, he must apply and represent the case to the Royal Tribunal General of Mexico, in order that, the merit and circumstances of the undertaking (*empresa*) being proved, it may report upon the matter to the Viceroy, who finding therein nothing prejudicial to the Body of Mining, to the public, or to my Royal Treasury, but rather advantageous, will grant to him this and other privileges, exemptions and assistance which may be given, provided, that my Royal approval be previously obtained for all such gifts (*gracias*) as do not come within the ordinary authority of the Viceroy."

"*Of Mines worked in Partnership.*

"Art. 1. Inasmuch as many mines are worked by several miners united, their partnership beginning from the time they denounce them, or being subsequently entered into in various ways; and as this is of great advantage and utility in working mines, since it is more easy to engage therein where many unite together, each contributing his part of the capital, or because where the capital of one alone is not sufficient for great undertakings, (*empresas*) that of all the partners may be ample; I will and command that such special or general partnerships be encouraged, promoted and protected by all convenient measures, my Viceroy granting to those who may form them all the favors, (*gracias*) assistance and exemptions which can be granted to them, according to the judgment and discretion of the Royal Tribunal of Mining, and without detriment to the interests of the public and of my Royal Treasury."

The Ordinances of 1783, except in the few respects in which, as we have seen, they were repealed by the Constitution of 1824 and by decrees of a later date, continued in force in Mexico after it became an independent nation. The whole system of Spanish Mining Jurisprudence was adopted by Mexico. The discoverer had the same rights, the size of *pertenencias*, their number, the mode of measurig them, the causes of forfeiture, the method of denouncement—all these things continued. Registry was still a judicial act. Why should we say that the encouragement of great undertakings and extensive enterprises in mining, so carefully provided for by the Ordinances, and so essential to a complete code of mining laws, ceased to be within the competency of the administrative power of that Government. I can see no reason why these Ordinances were not adopted by Mexico in that respect as well as in others.

Lares, the only Mexican writer on Administrative Law whose works I have seen, lays down the general proposition, that the concession of mines by registry of discovery or denouncement belongs to the judicial authority; but he excepts cases of habilitation by the Government of several mines, or other great undertakings of that kind, and then, he says, the concession is made by the Executive on the report of the Mining Tribunal. He says this distinction is derived from the Mining Ordinances of 1783, and regrets that it has not been more clearly marked out.

"It is moreover to be desired that, distinguishing in these concessions [of mines] between the rights of the land-owner and what only corresponds to the general interest of the working, [of mines] there should be marked out what corresponds to the *judicial power*, and that which ought to be reserved to the *administrative power*. Until this is done, we have no other rule but to follow the Ordinances.—*Lares' Der. Adm.* 93.

"According to these Ordinances, [of 1783] the title to acquire mines is the *concession:* but this does not properly belong to the *administrative* power, but to the special tribunals which the same Ordinances establish, and which have cognizance of registries and denouncements, and contentious jurisdiction of all causes in which are involved questions relative to the acquisition, preservation, and loss of mines. Only in the case of asking for the habilitation of

several mines, or other considerable undertaking of this kind, to make the concession belongs to the Executive (*al Gobierno*) on the report of the Tribunal General, to which the petition should be made."—*Lares' Der. Adm.* 91.

This authority is clear, direct, positive, in favor of the position, that after the independence of Mexico, the Ordinances of 1783 remained in force in that country, as well in those provisions which referred to administrative or special grants, as in those which related to the general or ordinary grants to discoverers and denouncers. And that in respect to the former class, the Executive of Mexico exercised the administrative powers which those Ordinances ascribe to the Viceroy, with the King's approval.

That such is the understanding of the law in Mexico, and the practise of the Government, I have proven by the certificate of Señor Siliceo, Minister of Fomento, Colonization, etc, in 1856; and I have offered in evidence a duly certified copy of a decree issued by him in 1856, in favor of certain parties who asked a larger number of pertenencias than the Alcalde could admit the registry of.—*Trans.* 2913–14.

I have also introduced a duly certified copy of an *espediente* in the Ministry of Fomento, Colonization, etc, relating to the action of the Government on the petition of Señor Don Antonio Garay, presented in the name of the Mexican Company of Mines of the Department of Oajaca, asking that there might be granted to the mine of San Baltazar a *pertenencia* of a thousand varas in all directions, without including those which were measured off when possession was given him. The petition was discussed, and reasons assigned in its favor, and a *pertenencia* of the said dimensions granted by the President.—*Trans.* 2915 *et seq.*

In *Chouteau* v. *Moloney*, (16 How. 231) we have an instance of the confirmation by Governor General Carondelet, of the permission given by the Fox Indians to Dubuque, to work mines in quite a large tract of country. The Indian Grant is on page 223; Carondelet's Confirmation, on p. 225; Construction by Court, on p. 235.

In *Delassus* v. *United States*, (9 Pet. 117) we have an instance of a grant by Trudeau, Lieutenant Governor of Western Illinois, to Delassus, of a square league of land, with all the lead mines he

can find in it. This grant, it appears, was made with the object of obtaining for Government a certain amount of lead, which Delassus promised to furnish. Carondelet's Order to Trudeau, on pp. 122, 123; His letter to Dalossus, p. 123; Trudeau's Concession to Delassus, p. 123.

And again, in *Smith* v. *United States*, 10 Pet. 326, there is a grant by Governor General Carondelet to James St. Vrain and his heirs, in full property of ten thousand superficial arpents of land, with the special permission to locate in separate pieces upon different mines of what nature they may be, salines, etc. The claim was rejected because there had been no location of it at the proper time. The power of the Governor General to make it was not doubted.

Delassus' grant was made in 1795; Dubuque's Indian grant in 1795, and confirmed in 1796; and St. Vrain's in 1796. Mr. Justice Wayne delivering the opinion of the Court, in *Chouteau* vs. *Moloney*, said: "What were the regulations of France in respect to mines in her colonies, we need not inquire into, as the transaction we have before us happened after France had parted with the province, and after Spain had legislated new Ordinances on the subject of mines, which were applicable to all her dominions, as well those in North as in South America. We mean the Ordinances entered in the General Land Office of the Indies at Madrid, the twenty-fifth of May, 1783." The same may be said of the other two cases cited.

I will close this part of my argument with an extract from the opinion of Mr. Commissioner Felch in this case.

"Registry was nothing more than the presentation to the proper officer of a written description of the person who had found the mine, and the place where it was situated, with an exhibition of a specimen of the ore, and a claim of the rights of the discoverer therein.

"This was followed by the registry thereof made by the officer, and the subsequent assignment of boundaries and giving possession. *Rock*, p. 173.

"This simple act perfected in the discoverer all the right in the mine which the citizen could ever acquire. The right of every one in this simple manner to possess the mines, is what is meant by the saying often repeated in the books, that the mines were common to

all; the tribunal was usually at the door of the discoverer or denouncer; the process without expense; the proceedings with little formality, and the interest one acquired was held under the terms of decrees and customs known to all.

"But this method of acquiring the right to a mine might not be, and perhaps never was, the only one by which the miner's right might be secured. While the mines continued a part of the royal prerogative, the method of acquiring them was subject to be changed or modified at any time by the decree of the King.

"And after the independence of Mexico, though the old laws remained in force, when not contrary to the new order of things, or expressly annulled, the sovereign power of the new nation might at any time have changed the manner of acquiring such rights.

"Such I regard the effects of the decrees passed subsequently to the independence, and especially of those of the second of December, 1842, and of the twenty-fifth of September, 1843, establishing and prescribing the powers and duties of the Board for the Encouragement of Mining.

"The policy of the Royal Government of Spain was to monopolize the supply of quicksilver for the mines in Mexico, to prohibit all importation by others, and all traffic in it by individuals, and finally to interdict the opening and working of mines of it which it might be known throughout Mexico.

"When the independent government was established, the policy in Mexico was changed. It was then an object to render all importations, especially from Old Spain, unnecessary; and in order to obtain the indispensable supply for the working of the gold and silver mines, to give every inducement which the government could afford to discover and open, and render productive, the mines of quicksilver.

"Hence the decrees making quicksilver a free article of commerce, and exempt from all duties, whether imported or obtained from the mines of the country; the allowance of a Government premium of five dollars per quintal; the raising of funds from specified sources for the purchase of quicksilver, to be distributed among the mines; the exemption of the miners from duties, taxes, and arrests; the creation of officers to take charge of the subject, and to use money to promote the working of such mines.

"To the new tribunal, the Board for the Encouragement of Mines, was especially committed the charge of determining, with the approval of the Government, the manner of obtaining quicksilver, and the cases and modes in which the working of quicksilver mines in the Republic should be encouraged by rewards, or in any other way promoted.

"By the decree of September 25th, 1843, the Board was authorized to decide upon the places which should be established in preference, and the sum which should be advanced to put the establishments in operation, the same to be approved by the Government; and the two methods of furnishing supplies—first, by an advance of the necessary amount, at an annual interest; and second, by becoming supplier of the mine, directing its operations and sharing the profits—show both the anxiety of Government to open new mines of that metal in the Republic, and the broad discretionary powers over the subject given to the Board.

"All the mines in the Republic which had not already been acquired by individuals, agreeably to former decrees, whether on the National domain, or on lands ceded under the colonization laws, belonged to the nation.

"Commissioners were appointed to explore and discover them, and it can scarcely be doubted, if such were newly discovered, to which no individual rights had attached, the Board had full power to arrange for opening and working with any individual, and upon any terms authorized by the law and approved by the President.

"I do not suppose, in such a case, that they were required to make a registry before the local authority, before such arrangments could be made.

"None but the discoverer could proceed to make a registry, and it seems to me preposterous to say that the Board, the officers of the Government, could not make a contract with an individual to work a mine under the terms of the law, which should be binding on the Government, unless a Registry was had before the local authorities in the first place.

"The Board might contract for the working of the mines for five, or ten, or fifty years, on certain terms.

"This is as much the act of the Government, and would seem to transfer the Government's right to the mine to the contractor, as

surely as the proceedings in registration transfers to the discoverer the precise interest in the mine, which the law declared he should obtain by his registration.

"Nor do I think there is anything to prevent an arrangement, under the terms of the decree, with the new discoverer of a mine, upon the proper evidence being laid before the Board, to work the same, although he has not proceeded to a registry in the place of its locality.

"If, through fraud or misapprehension, by chance, individual rights previously acquired should be infringed, in such a case the party would not be without a remedy; but where, as in the case before us, no such infringment is suggested, the Government itself would be bound by its agreement with the contractor.

"From the very nature of the case, such a contract made with the national authorities, upon a subject-matter recognized to belong to the nation, implies a possession of, and a right in, the mine.

"That interest would be such as is specified in the contract, and where that is silent as to the character and nature of the tenure, the laws and recognized customs of the country as to such right, must govern.

"The right to contract for the working of a mine, on such terms as the Board, with the approval of the Supreme Government might see fit, necessarily implies that the contractor might receive an interest in the mines different from that secured to the new discoverer by the act of registration. The size of the mine might be enlarged, the work of opening and working it be modified, and the multifarious and minute directions by which the right of the new discoverer under a registration were burdened and restricted, might be modified by the contract in any of those methods which the discretion of the public officers should dictate as the most effectual to render the mine productive.

"That this was the design of establishing the Board, and of giving the full powers over mines, which are specified in the decree, I cannot doubt.

"But let us suppose that a contract for the working of a mine can confer no right in it to the contractor, who is the discoverer, unless he first registers that discovery in the proper locality.

"The present case may illustrate most fully the consequence.

"In the locality of San José there was no person, but an Alcalde, to whom the discoverer could apply for registration, and the Law Agent argues upon us that he had no authority, and that his act is therefore totally void. There were other districts, also, where the officers specially designated by name in the regulation of 1783, for the purpose, were not in being. Admit that in all these no person was authorized to make such registrations, and in California, where nothing but the curse of blindness, it would seem, could prevent the discovery of the richest mines at almost every step, no registration could be made, and consequently no individual could entitle himself to work any mine which he might have discovered.

"Can it be possible that the Board, who were required to encourage mining everywhere throughout the Republic, could here do nothing to foster it when new mines were discovered; when premiums were offered for every pound of quicksilver produced in the country? Was there no right in any of the executive officers of the Government, to arrange for, the rich supply which the mine afforded, simply because no officer at the spot could make a registration, or entertain proceedings for a denouncement? With the duty imposed on the Board to send a commission into every department to examine and explore scientifically in search of quicksilver mines, and to report fully on the subject of their value, and the expense of working them, can it be, that however rich might be the deposits discovered, no contract for working them could be made, for want of officers to make the registration? Or that, with money at their command, which the Board was authorized to advance for the purpose, with full powers to contract at the discretion of themselves and the Government, the great object which lay at the bottom of the Mexican political economy, and for which more than any other, they provided by law, the supplying of quicksilver for the working of the mines, must, for this reason, prove abortive?

"In my judgment, the provisions of these enactments are not thus inert and inoperative.

"I think the powers of the Board, with the approval of the President, were amply sufficient, whether Castillero had obtained a registration of his discovery or not, to make with him a contract to work the mine according to the terms of the decrees of 1842 and 1843, and that said contract was binding on the Mexican Government.

"The rights which it secured to him were such as are specified in the contract, and where that is silent they are such as the laws and customs at that time recognized as belonging to a mining possession, acquired in the usual manner by registration or denouncement.

"In either aspect of the case, I think the petitioner has established his right to the mine."

The Board of Land Commissioners made the following decree in confirmation of the mining claim.

"In this case, on hearing the proof and allegations, it is adjudged by the Commission, that the claim of the said petitioner to the mine known by the name of New Almaden, (formerly called Santa Clara) together with the right of enjoying the privileges as mine-owner under the Mexican Law, within the space, as pertenencia, of three thousand varas in all directions from the mouth of the said mine, as originally opened by said Castillero, is valid, and it is therefore decreed that the same be confirmed to him."

They rejected his other claim for two square leagues, because in their opinion the Castillo Lanzas' dispatch of May 23d, 1846, did not contains words of grant.

I have thus shown, by reason, authority and precedent, that the President of Mexico lawfully possessed the power to confirm Castillero's mining possession. But if a doubt remain in regard to the question, arising from our want of familiarity with a system of law new to us, and for the first time considered by the Court in this case, and from our ignorance of the every day practice of the country where it has prevailed for many years, I submit that according to the best rule of construction that doubt must be resolved in favor of the validity of the act of the supreme Executive of Mexico, who, we are bound to presume, did not exceed his powers, until it is clearly demonstrated that he did exceed them.

And I beg the Court to remember that the foregoing argument relates entirely to the statutory powers of the President of Mexico. In the argument on the two league grant, to which I am about to proceed, I think I shall show beyond all doubt that Paredes, who was President when Castillero's transactions took place, possessed the extraordinary powers appertaining to a military chieftain who, having overthrown a government by force of arms, assumed control over all the affairs of the nation, and remained the sole representative and organ of its power.

THE TWO LEAGUE GRANT.

On the tenth of December, 1845, Castillero, after informing Gov. Pico of his discovery and denouncement of the mine, adds: "I am sure that yourself and the Departmental Junta will appreciate a discovery which will form the riches of the country, *and we wish that the vacant lands near our works be conceded to us, to cut wood, with the order of possession.*"—*Trans.* 1805.

The foregoing letter was sent by Gov. Pico to the Minister of Relations, on the thirteenth of February, 1846, Trans. 1805; and received by the latter on the sixth of April, 1846, as by marginal note.

On the sixth of April, 1846, the Minister of Relations answered Gov. Pico's letter, directing the Departmental Government to report what it might deem convenient in regard to the matters of Castillero's letter.

On the thirty-first of December, 1845, Manuel Castro, prefect, in a communication to the Governor, officially announcing the discovery and the working of the mine, enclosed Castillero's petition for "*a piece of land of two square leagues which is adjacent to said mine*," &c.—*Trans.* 2550.

The enclosed petition cannot be found in the archives, nor does it appear what action was taken on it by the Departmental Government.

When Castillero registered the mine, he thought it was on Berreyesa's rancho, and so described it.

But before he left California he was informed of his mistake, and

in Mexico he learned from Gov. Micheltorena the fraud which Berreyesa had practised in giving him a copy of his grant, in which it appeared that it was for two leagues.

This will appear from Castillero's letter to Alexander Forbes, of the fourteenth of January, 1847.—Trans., 3049. The copy of the Berreyesa grant referred to is in Berreyesa's own hand. Vide Exhibit Suñol No. 1. Trans., 2730. Proved by Suñol, Trans., 2728, and by Pico. Berreyesa was killed in June, 1846.

Being thus satisfied that the mine was not on Berreyesa's land, Castillero, in his proposed contract with the Mexican Government, presented on the twelfth of May, 1846, inserted the following article:

"Eighth. It (the Junta) shall also represent the advantage of there being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of enabling me to use the wood for my burnings,"—*Trans.* 1602, *Spanish*; 1802, *English.*

ACTION OF THE GOVERNMENT ON CASTILLERO'S PROPOSED CONTRACT.

I. The Junta de Fomento, on the fourteenth of May, 1846, urged the Supreme Government to agree to the contract as proposed, except in regard to this grant of two square leagues, concerning which it forbore to express an opinion, but referred the Government to information within its reach.—*Trans.* 1798, *English*; 1608, *Spanish.*

II. On the twentieth of May, 1846, the Supreme Government agreed to Castillero's proposed contract in all its parts, as is shown:

1st. By the marginal decree on the Junta's letter, signed with the rubric of the Minister of Justice, and dated the twentieth of May, 1846.—*Trans*, 1608, *Spanish*; 1798, *English.*

2nd. By the record of that marginal decree in the General Book.—*Trans.* 1627, *Spanish*; 1816, *English.*

3rd. By the official dispatch from the Minister of Justice to the Junta de Fomento, the twentieth of May, 1846.—*Trans.* 1602, *Spanish*; 1792, *English.*

4th. By the official dispatch from the Minister of Justice to the Minister of Relations, the twentieth of May, 1846.—*Trans.* 1617, *Spanish;* 1807, *English.*

5th. By the official despatch from the Minister of Relations to the Governor of California, the twenty-third of May, 1846, offered by Castillero as evidence of the grant of two leagues. Filed in Land Commission.—*Trans.* 65, *Spanish;* 67, *English.*

III. The marginal degree above referred to is in these words:

"It is granted in the terms proposed; and as regards the land, let the corresponding order issue to the Minister of Relations for the measures of his office, with the understanding that the Supreme Government accedes to the petition."

All that is proposed is granted, the two square leagues among other things. But as in regard to them it was necessary to take other steps in order to carry out the grant into complete execution, the Minister of Justice directs that appropriate orders be issued to the Minister of Relations, who is to be informed that the Supreme Government has acceded to Castillero's petition.

Accordingly, on the twentieth of May, 1846, the Minister of Relations is informed that the President has approved in all its parts the contract proposed by Castillero. But as the Minister of Relations did not know what that contract was, the Minister of Justice tells him that Castillero had petitioned for a grant as a colonist, of two square leagues on the land of his mining possession, and that the President had acceded to that petition. The Minister of Relations is then requested to issue the proper orders.

And thereupon, on the twenty-third of May, 1846, the proper order was issued by him.

That order is to the Governor of California, directing him to put Castillero in possession of the two square leagues, and reads as follows:

MINISTRY OF FOREIGN RELATIONS, GOVERNMENT AND POLICE.

MOST EXCELLENT SIR:

The Excellent and Illustrious Señor Minister of Justice, in an official communication of the present month, says to me what follows:

EXCELLENT SIR:

"I have this day said to His Excellency Señor Don Vicente Segura, President of the *Junta de Fomento de Mineria*, what follows:

'EXCELLENT SIR:

Having laid before His Excellency, the President *ad interim*, the petition of Señor Don Andres Castillero for the encouragement of the mine of quicksilver which he has discovered in the Mission of Santa Clara in Upper California, with the note of Your Excellency of the fourteenth instant, with which you were pleased to accompany and recommend it, His Excellency has been pleased to approve in all its parts the contract celebrated with that individual for the commencement of the working of said mine; and on this day the proper communication has been sent to the Ministry of Foreign Relations and Government, to the end that suitable orders may be issued with respect to what is contained in the Eighth Article relative to the grant of lands in that Department.'

"And I have the honor to insert it (in this) to Your Excellency, to the end that with respect to the petition of Señor Castillero, to which the Excellent Señor President *ad interim* has thought proper to accede, that as a colonist there be granted to him two square leagues on the land of his mining possession, you will be pleased to issue the orders referred to."

I repeat to Your Excellency, etc.

And I transcribe it to Your Excellency in order that, in conformity with what the laws and dispositions on colonization provide, you may put Señor Castillero in possession of the said two leagues.

God and Liberty. CASTILLO LANZAS.

Excellent Señor Governor of the Department of Californias. Mexico, May 23d, 1846.

It is contended by the Government that the Castillo Lanzas dispatch is not a grant; but is an order merely on the Governor directing him to make a grant. This construction is drawn from the following words in the letter of the minister of Relations to the Minister of Justice: "And I have the honor to insert it to Your Excellency, to the end that with respect to the petition of Señor Castillero, to which the Excellent Señor President has thought proper to accede, *that* (*sobre que*) there be granted to him, as a colonist, two square leagues upon the land of his mining possession, it may please Your Excellency to issue the orders referred to."

All the translations of the foregoing sentence in the transcript are wrong. They omit the word *that* which I have italicized.

The words "that there be granted to him, as a colonist, two square leagues on the land of his mining possession," are evidently descriptive of the petition of Castillero to which the Minister of Justice informs the Minister of Relations the President has acceded.

The Government would make out that the Minister of Relations is directed to issue orders that there be granted to Castillero, as a colonist, two square leagues, etc. This construction is, I think, unwarranted.

The Minister of Justice is directed to issue certain orders in relation to something the President has done.

What has the President done? Acceded to Castillero's petition. What did Castillero ask for? A grant of two square leagues, as a colonist, on the land of his mining possession. All this information the Minister of Justice gives the Minister of Relations to guide him in the business.

The marginal decree, beginning, "It is granted in the terms proposed," etc.; the letter from the Minister of Justice to the Minister of Relations, just referred to; and that from the Minister of Relations to the Governor of California, directing him *to put Castillero in possession of said two square leagues*, [not to make him a grant of them] seem to me to put beyond doubt the true meaning of the Castillo Lanzas dispatch, and to show that it is a grant by the President of Mexico of two square leagues to Castillero, as a colonist, on the land of his mining possession.

The Power of the President to make the Grant under the Colonization Law of 1824; the Act of Congress of fourth April, 1837; and the Decree of the eleventh March, 1842.

The next question to be considered is the power of the President to make this grant.

I contend that this power was conferred on him by the Colonization law of 1824, by the law of fourth April, 1837, and by the decree of the eleventh March, 1842. I am now speaking of the statutory powers of the Executive. Paredes' revolutionary powers will be the subject of separate discussion.

And First, of the Law of 1824.

The Constitutive Act of Confederation, dividing all Mexico into States and Territories, was decreed on the thirty-first January, 1824.

The Colonization Law was passed on the eighteenth August, 1824.

The formal Federal Constitution, known as that of 1824, was adopted on the fourth October of that year.

The Colonization Law was framed with reference to the political government then being firmly established. Its third article confides to the Congresses of the States the duty of colonizing within their respective limits; and the sixteenth article declares that the Supreme Executive shall proceed to the colonization of the Territories. The Congresses of the States, and the Supreme Executive, were both required to conduct colonization according to the principles established by that law.

Those principles were of a general character, and fixed nothing in reference to the *particular steps and agencies*, by means of which the title might pass to the colonist.

The third and sixteenth sections contain grants of power, and limit its exercise only by the principles of the law.

The President had as much right to grant lands in the Territories as the several Congresses within the limits of their respective States.

No one can deny validity to a legislative grant in colonization by the Congress of a State, not contravening the principles established by the law.

The validity of a similar grant by the Supreme Executive seems to me equally clear.

As for the sake of convenience, the Congresses of the States made laws prescribing a certain process, and establishing certain agencies for the granting of lands; so the Supreme Executive made his general regulations to effect the same purposes. The law, in the first instance, did not take away from Congress the power to make a legislative grant; nor in the last did his own regulations deprive the President of the power to grant by his own immediate action.

In the exercise of the power conferred on him by the sixteenth article of the Colonization Law, the President might have directed the authorities of the Territory to report to him on the propriety of

acceding to petitions for land, reserving to himself the right to grant, or to refuse to grant, in every instance.

Or he might have appointed Commissioners in colonization to make grants.

All the powers over colonization exercised by the Territorial authorities of California, were conferred upon them by the Executive Regulations of 1828; they had none other. "The first section of these regulations," say the Supreme Court, "gives the authority to the Governors (*gefe politico*) to grant vacant lands." *Arguello* v. *United States*, 18 How. 543.

These regulations, being the mere creature of the President, might have been amended or repealed by him at pleasure.

He could not, by any regulation of his own, deprive himself of any power conferred on him by law; as long as the law lasted, the power remained.

The power of the President of Mexico to make colonization grants, not merely by his agents, but by his own immediate action, is apparent from the regulations of 1828. They did not confer on the Territorial authorities the power to make *empressario* grants, but directed such to be brought up for the action of the President. Again, in the event of a disagreement between the Political Chief and the Territorial Deputation on the propriety of making a grant, the whole matter was to be referred to the President for his final action. If he saw fit, he would make the grant; if not, he would refuse to do so.

Thus contingencies might have happened, which would have made every colonization grant in California come directly from the President of Mexico.

In our own case: Suppose Castillero had obtained a concession of two leagues from the Governor, and the Assembly had refused to approve it. Pursuing the regulations of 1828, the espediente of the proceedings would have been sent to the President of Mexico for his resolution. The concession by the Governor did not confer title. No document of title was to issue, and no possession was to be had until the grant had been made definitive by the concurrent action of the Governor and of the Assembly. In the supposed case, then, it would be the action of the President which would either make the grant, or destroy whatever had been done towards making it. The

President would be the grantor, if his resolution were favorable to the petitioner.

But why must the exercise of the granting power by the President be preceded by a disagreement between two agents appointed by himself, whose concurent action he has made necessary to a grant, and who derive all their power from him, and hold them at his pleasure? To assert this, would be to make the agent more powerful than the principal—to ascribe to a delegated power, superiority over the power which delegates.

I have read with great care the argument of the special counsel of the Government on this point, but have failed to see the applicability of his reasoning to the question at issue. I do not see what bearing on this discussion, the theory of the Spanish Monarchy, and the method of promulgating laws, can possibly have.

Could not the King of Spain, by his Minister of the Indies, have granted lands anywhere within his dominions in America? And if the grant described the lands with certainty, how else could such lands have been more completely transferred to the grantee.

It is necessary to a grant, says the counsel for the Government, that there should be a writing signifying the will of the grantor, and an act of delivery, and apprehension of the land granted. If the Government's counsel means to assert that these two things are essential to the nature of a grant, I beg leave to express my dissent from the proposition. Here, at my desk in San Francisco, by a writing under seal, I can transfer all the right and title I have to lands in Virginia, to any grantee I may name. Such a deed would take out of me my title to such lands just as effectually as if I were to go on the land, and put a clod of earth, or the keys of a house in the hands of my grantee. The seizin goes with the title, and that is transferred by the deed.

It is very true, that when grants of land were made by the Spanish and Mexican Governments, theoretically speaking, the grantee had no right to put himself in possession of the land by his own act, because that would be permitting him to identify the land, and to take possession of just such as he might consider had been granted. It was deemed convenient and proper that some officer of the Government should examine the title, ascertain the identity of the land, and by a notorious act put the grantee in possession. Such were the purposes of juridical possession.

What is known in California as juridical possession, was not *entirely* such. The magistrate was directed first to *measure* a certain quantity of land within a specified tract of country; then to put the grantee in possession of the land so measured—the surplus within the tract remaining the property of the nation.

Let us take such a case as this: The Governor grants; the Assembly approves; the final document of title is delivered. The grantee has never been in possession. The American flag is hoisted. The grantee, says the special counsel for the Government, has no title. But the Supreme Court say otherwise in Fossatt's case, where they declare that the measurement and investiture of possession are merely executive acts, the duty of performing which, has devolved upon our Government. And in *Chouteau* v. *Moloney*, 16 How. 236, the Supreme Court, treating of the necessity of a survey under the Spanish system, which corresponded precisely with juridical possession under the Mexican, say: "No one of them would have ventured to stretch a chain upon the land with a view of separating it from the public domain without special authority to do so from the Governor. Such an order was the uniform accompaniment of a grant, and without it a concession was incomplete; though when given, *if circumstances interfered with its execution, it did not lessen the completeness of the title, if the description of the land were such that it could be carried into a survey.*"

I surely cannot be required to answer, at this late day, an objection to our title on the ground that the grantee was not put in juridical possession of his land. If such an objection was ever raised, it has been put to rest by the Fremont and Fossatt cases, and by many others from California recently decided by this Court.

If, therefore, the President had the power to make our grant, and did make it, and directed the Governor of California to put us in possession of the land, the circumstances which interfered with the execution of the order, so far from rendering the grant a nullity, did not, in the language of the Supreme Court just cited, "*lessen the completeness of the title*," because "*the description of land was such that it could be carried into a survey.*—*Chouteau* v. *Moloney*, 16 How. 236.

The case of *The United States* v. *Miranda*, so far from sustaining the position of the Government's counsel, that actual seizin and

possession are essential to a grant of lands, establishes the precise reverse. The Court say: "And the words *in possession of them* have by this Court, in *Arredondo's* case, 6 Pet. 741, and in all other cases upon Florida grants, after it, been determined not to imply occupation or residence only, but a legal seizin. The Court said in that case: 'By grants of land, we do not mean the mere grant itself, but the right, title, legal possession and estate, property and ownership, legally resulting upon a grant of land to the owner.' But in the case before us, from the want of survey, or some point for the beginning of one, there can be neither seizin in fact or in law; for identity of premises is as essential for a seizin in law, as it is necessarily implied in a seizin in fact."—*United States* v. *Miranda*, 16 Pet. 159.

The power of the President to make the grant in question is further denied by the counsel for the Government, on the ground that it would be repugnant to the constitution of the former government of California. On this point I find myself under the misfortune of not being able to understand the counsel's argument.

I refer to the colonization of 1824. I show that the sixteenth Article of that law confides to the President of the Republic the colonization of the Territories, and clothes him with the power of transferring to individual colonists the title of the nation to the public lands.

The counsel for the Government does not deny the power of the Mexican Congress to dispose of the public lands, nor question their right to confer upon the Supreme Executive full authority over colonization in the Territories. And as he has failed to make answer to my construction of the Colonization Law of 1824, in respect to the power with which it invests the President, I must presume he has nothing to say against it.

As little have I to say against his theory of the Mexican Constitution, derived from Alaman's picture of the Spanish Monarchy.

If the counsel for the Government, admitting my construction of the colonization law of 1824, had contended that the law was unconstitutional, as opposed to the Federal Constitution of 1824, or to the Constitution of 1836, or to that of 1843, or to the Plan of San Luis Potosi—Parades' plan of Government—I might thank him for a discovery which the Mexican Courts had failed to make

in many years. But he says nothing about the law—and strange to say, he does not refer to any one provision of the numerous Constitutions whose sequence he gives, to which the power claimed by the President is repugnant.

He says that the Mexican Government was "a Government of Governments;" that "its model was the organization of an army;" that "a very elegant and concise exposition of the nature of the Spanish Government of the Indies" is given by Alaman; he cites the Novissima Recopilacion to show that before laws acquire force, they must be published; he treats of the promulgation of laws; he shows how the Mining Ordinances of 1783 were promulgated in different places at different times; he refers to the Spanish Constitution of 1812; to the Mexican Constitutive Act of 1824; to the Constitution of the same year; to that of 1835; to the Bases of Tacubaya, and to the Bases of Organicas of 1843; from all which he concludes there has been no change from the original plan for the Government of the Californias, derived from the Spanish Monarchy. Strange conclusion! From 1824 to 1836, California bore precisely the same relation to the Federal Government, that the Territories of the United States sustain to our General Government. Under the departmental system, Californias enjoyed the same political power as any other department of Mexico.

This strange conclusion is made the premise of a conclusion still more strange. In the Governor's hands, says the Government's counsel, necessarily was the public domain; the juridical possession which followed the Governor's grant shows that it was not a useless ceremony, nor merely a survey, but intended to represent the actual tradition of the thing granted, etc.

The counsel for the Government surely does not mean by all this, that the Political Chief of the Territory of California, or the Governor of the Department of Californias, by *virtue of his office*, had the power to dispose of the public lands; and was so possessed of them that some act of his own was necessary to divest himself, and transfer possession to another. If such be his meaning, the proposition is asserted for the first time in California. Such power was never claimed by any Governor of California, with the exception, perhaps, of one or two instances of revolutionary acts by Alvarado, done in the name of the *Independent and Sovereign State of Cal-*

ifornia. On the contrary, the Colonization Law of 1824, and the Executive Regulations of 1828, have always been recognized by the authorities of California, and by those of our own Government, as the source of power under which the plan of colonization was carried out in this Department.

Neither can it be denied that the public lands in the Territories, under the Federal Constitution of 1824, and under the Central or Departmental form of Government, wheresoever situate in the Republic, were regarded and treated as *the property of the Nation, in possession of the Nation, grantable by the Nation.* Such being the case, it seems to me very absurd to assert that the *local* Governors were so possessed of the *public* domain, that it could be granted only by the concurrent action of the nation, in transferring *the right of property*, and of the local Governor in *vesting possession.* For if both these acts were essential to a grant, and the latter rested solely in the independent will of the local Governor, the nation could not dispose of its own property according to its sovereign pleasure.

If the Court will examine the Mexican Decree of the fourth of April, 1837, entitled: "*Decree to effect the Colonization of the Lands of the Republic*," and Santa Anna's Decree of the eleventh of March, 1842, in its twelfth article, Halleck's Col. 429, they will find it expressly declared, that to the Supreme Executive, representing the dominion of the Mexican nation, belongs the right to dispose of the vacant lands in all the Departments of the Republic.

Juridical possession, then, being an executive act, would be ordered and conducted with reference to executive superiority and subordination. If the grant were made, like Castillero's, by the Supreme Executive, the order for possession would be directed to the Governor of the Department, who would in his turn order the proper magistrate to execute it. All executive orders would properly pass from the Supreme Executive to the highest local Executive, and through the latter to inferior magistrates.

If the grant were made by the Governor and Departmental Assembly, the order for possession would be directed immediately to the local magistrate.

But in the case first supposed, the necessity of juridical possession as the complement of title, is in no wise greater than in the

last—nor are its functions, purposes and effects in the least degree different in the two cases.

It is to be remembered, that at the date of Castillero's two-league grant, he was already in possession of the mine, and of three thousand varas of land in all directions from its mouth.

But it may be said that inasmuch as the Supreme Executive, by his Regulations of 1828, had provided the agencies, and directed the measures for the colonization of the Territories, he thereby divested himself of the power to make grants in a mode different from that which he had prescribed. I can see no force in this argument. These Regulations were only the *general plan* for the colonization of the Territories, devised by the President, appointing agents, and containing certain directory and mandatory provisions, to be observed by them. The Regulations themselves might have been at any moment altered or repealed, and the powers they conferred revoked. The whole matter rested continually in the discretion of the President. Surely the President was not so hampered by general regulations, made for his subordinates in the year 1828, as to be obliged to change or repeal them, before he could exercise the granting power in his own person, if years afterward the great interest of the nation manifestly required him to make use of it to secure a particular object.

Surely, he was not limited in the exercise of the granting power to *those cases* which in the event of a disagreement between agents whose concurrent action he required, he had said should be brought before him for his action. Surely, if for any national purpose it was deemed proper to grant land in a Department to a colonist, and both the Governor and the Assembly, after being ordered by the President, had refused to make the concession; *to grant a tract of land which was the property of the nation, not that of the Department;* the President of Mexico was not obliged to precede his act of granting by a revocation of the powers he had given to refractory agents, and a withdrawal of the trust he had reposed in their discretion. It would be singular indeed if the Supreme Executive, to whom the nation had by law confided the disposal of the land belonging to the nation, could not, because for convenience' sake he had delegated the general execution of that trust to certain agents, whose acts were valid only in so far as they repre-

sented his will and authority, himself in a particular case exercise the power he had conferred on others. If the Governor of California had conceded the land in question to Castillero, and the Assembly had refused to approve the act, no one will deny that the President of Mexico, by approving what the Governor had done, would really make the grant, and by disapproving, would effectually nullify whatever incipient steps towards title had been taken. But why in the case supposed would the application be sent up to the President? For no other reason than that he had so ordered. But because he had ordered such cases to be laid before him for his action, does it follow that he could not act in any other cases, and however great or urgent the necessity, dispose for the benefit of the nation, of the public lands which the nation had given him the power and imposed on him the duty of disposing of, if the local authorities to whom he had entrusted the general execution of that power should both refuse to exercise it in favor of a particular individual. I do not think it was competent for the President of Mexico to divest himself of power; to disable himself for the discharge of his duty, by any regulations delegating that power and transferring that duty to others. He had no right to place the property of the nation so entirely at the disposal of the local authorities of the territory in which it was situated, that he could not himself dispose of it, in conformity with the principles of the colonization law, so as to best subserve the interests of the whole Republic.

We must not fall into the error of regarding the Regulations of 1828 as an administrative act, within the general scope of the administrative function. The power to dispose of the public lands of Mexico did not belong to the Executive in virtue of his office, according to the theory of the constitution of the Mexican Government. That power was first vested by the 16th article of the colonization law of 1824 in the President of the Republic, subject only to the requisition of conformity with the principles established by the law. He was required to proceed to the colonization of the Territories. The power to grant to individuals was conferred on him. No colonist could acquire title to land in a territory, which did not emanate, mediately or immediately, from him. Everything in relation to colonization in the territories was confided to his power and discretion. Having from motives of convenience dele-

gated this power to local agents, the nation was bound by their action, but upon no principle of law with which I am acquainted, can the President be said to have put all power out of himself by his own regulations, except so far as those regulations provided for his action. In reference to Congress, the President was agent; in reference to the authorities of California, he was principal. To say that the President of Mexico could not grant two square leagues of land to Castillero, because he had appointed subordinate agents to make grants in colonization, is to assert what has no precedent in law, and what in the forum of reason appears to me absurd.

The case of *Delassus* v. *The United States*, 9 Pet. 133–4, affords a precedent directly in point. Chief Justice Marshall, delivering the opinion of the Court, says:

"By the royal order of 1774, the power of granting lands, which had been invested in the Intendents by an order of 1768, was revested in the civil and military governors of the provinces, who retained it till 1798. In the execution of this power, the lieutenant governors or commandants of posts, as is fully shown by the proceedings before the various tribunals appointed under the authority of the United States, were employed (by the governors of provinces) to make the original concession and order of survey, and to put the grantee in possession.

"The objection made to this plain title is, that the concession [by Zenon Trudeau, Lieutenant Governor of the western part of Illinois, by special order of the Baron de Carondelet, Governor General of the province] is not made in pursuance of the regulations of O'Reilly."

"This objection was considered in the cases heretofore decided by this Court, especially in 8 Peters, 455. It is apparent that those regulations were intended for the general government of subordinate officers; not to control and limit the power of the person from whose will they emanated. The Baron de Carondelet, we must suppose, possessed all the powers which had been vested in Don O'Reilly; and a concession ordered by him is as valid as a similar concession directed by Governor O'Reilly would have been. Had Governor O'Reilly made such a grant, could it have been alleged that he had disabled himself by his instructions for the regulation of the conduct of his subordinate officers; instructions which

the power that created must have been capable of varying or annulling; from exercising the power vested in him by the crown? 9 Peters, 134."

Next of the Act of Congress of the fourth April, 1837, *and the decree of eleventh March*, 1842.

It will be remembered that the Colonization law of 1824, whose provisions were framed with reference to the political division of the country into States and Territories, and to the federal form of government then being established, gave to the Congresses of the States the power to carry out the plan of colonization in conformity with the principles of that law. The Federal Constitution of 1824 was subverted by the Central System, which, initiated in 1835, was extended, year after year, until about 1840, all Mexico was reduced under it. The General Government of the Confederation then became the Central Government of the nation, and the States losing their sovereign power, were converted into mere Departments of the Republic.

Some of the States contended that the 3d Article of the Colonization law of 1824 had granted to them the public lands in their limits, and when converted into departments, claimed the right to dispose of them. This claim was successfully resisted by the Central Government, which maintained that all the vacant lands in the Departments were the property of the Nation.

Acting on this principle, one of the earliest laws of the Mexican Congress, under the Central System, was that of the fourth April, 1837, entitled, "*Decree to effect the Colonization of the Lands of the Republic.*" As it is very short, I will translate it in full.

"The Supreme Executive, (*el gobierno*) with the consent of the Council, will proceed to effect the colonization of the lands, which are, and ought to be the property of the Republic, by means of sales, emphyteusis, or hypothecation, applying the proceeds (which at first should not be less than a dollar and a quarter per acre) to the payment of the national debt contracted or to be contracted; reserving always enough for the fulfillment of the promises made to the soldiers who fought for independence, and for the rewards and

grants which Congress may decree in favor of the indigenous tribes and nations, and of those who coöperated towards the reëstablishment of Texas; notwithstanding any laws heretofore passed on the subject of colonization, whose provisions are repealed so far as they are opposed to this law, repeating the prohibition of the 11th Article of the sixth of April, 1830."

The article of the law of 1830 referred to, prohibits the colonization of the border States and Territories with the citizens of the adjoining nations.

On the eleventh March, 1842, Santa Anna issued a decree, giving to foreigners domiciled in the Republic the right to acquire and hold real estate. The 12th Article of the decree is in the words following:

"12. Foreigners cannot acquire public or vacant lands in any of the departments without contracting for them with the Supreme Executive, which possesses this right by virtue of its representing the ownership of the Mexican nation."

It thus appears that as soon as the public lands, by the change from the Federal to the Central Government, came to be treated as the property of the nation, their disposal was confided to the Supreme Executive. The law of the fourth April, 1837, expressly gives him that power, and the decree of the eleventh March, 1842, declaring that vacant lands in all the Departments are the property of the nation, asserts for the Supreme Executive, who represents the ownership of the nation, the right to dispose of them.

It may be said that the law of the fourth April, 1837, gives to the President only the power to sell, or pledge the public lands. I shall show that the grant of two leagues to Castillero was in reward of valuable services, for which the nation had offered large pecuniary compensation—much larger than his two leagues would come to at a dollar and a quarter per acre.

THE CASTILLO LANZAS DISPATCH REGARDED AS AN ORDER TO THE GOVERNOR AND DEPARTMENTAL ASSEMBLY OF CALIFORNIA TO GRANT THE TWO SQUARE LEAGUES TO CASTILLERO.

Considered in this point of view, it is of the same nature with the grant of the Island of Santa Cruz, recently passed on by the Supreme Court. In that case the Court say: "Islands situated on the coast, it seems, were never granted by the Governors of California, or any of her authorities, under the colonization law of 1824 or the regulations of 1828. From all that has been exhibited in cases of this description, the better opinion is, that the power to grant the lands of the islands was neither claimed nor exercised by the authorities of the department prior to the twentieth day of July, 1838, as was satisfactorily shown in one or more cases heretofore considered and decided by this Court.

"On that day the Minister of the Interior, by the order of the Mexican President, addressed a communication to Governor Alvarado, authorizing him, in concurrence with the Departmental Assembly, to grant and distribute the lands of the desert islands adjacent to that department, to the citizens of the nation who might solicit the same. That dispatch bears date at a period when the President was in the exercise of extraordinary powers, and was issued, as appears by its recitals, with a view to promote the settlement of the unoccupied islands on the coast, and to prevent those exposed positions from becoming places of rendezvous and shelter for foreign adventurers, who might desire to invade that remote department."

The order of the twentieth of July, 1838, referred to by the Court, is in the following words:

MINSTRY OF THE INTERIOR.

Most Excellent Sir:—The Most Excellent Señor, the President, desiring, on the one side, to protect the population of the desert islands adjacent to that department which are a part of the national territory, and, on the other, to prevent the many foreign adventurers from enjoying these considerable portions, from which they may do great prejudice to our fishery, commerce, and interests, has been pleased to determine that Your Excellency, in concurrence with the Departmental Junta, proceed with activity and prudence

to grant and distribute lands in said islands, to the citizens who may solicit them. His Excellency particularly recommending the citizens Antonio and Carlos Carrillo for their useful and patriotic services, in order that they be attended to in preference, and that there be consigned to them exclusively one of the said islands which they themselves may select.

I have the honor to say this to Your Excellency for information and the corresponding effects.

God and Liberty. Mexico, July 20th, 1838.

PESADO.

To the Most Excellent Señor, the Governor of the Department of Californias, City of Los Angeles.

"Grants made by the Governor," continue the Court, "under the power conferred by that dispatch, without the concurrence of the Departmental Assembly, were simply void, for the reason that the power being a special one, could only be exercised in the manner therein prescribed. It was so held by this Court, in *United States* v. *Osio*, decided at the present term, and we are satisfied that the decision was correct."

Now the grant of the Island of Santa Cruz having been made by the Governor alone, the Departmenal Assembly not acting in the premises, Castillero's title, as far as its validity depended on the action of the local authorities of California, would have been in precisely the same predicament as Osio's. But while the Supreme Court declare the Governor's concession to Osio to be *a mere nullity*, they hold Castillero's title to be *perfect and complete*.

Whence the difference between the two? Let the Supreme Court answer.

"But the grant in this case was not made under the general authority conferred by that dispatch [meaning the one copied above]. In addition to what was exhibited in the former case, it now appears that another dispatch, of a special character, was addressed by the same Cabinet Minister to the Governor on the same day. Like the other, it bears date at the City of Mexico, on the twentieth day of July, 1838, and is signed by the Minister of the Interior. By the terms of the communication, the Governor is informed that the President, regarding the services rendered by this claimant to the nation, and to the department, as worthy of great consideration and full recompense, has directed the Minister

to recommend strongly to the Governor, and to the Departmental Assembly, that one of the islands, such as the claimant might select, near where he ought to reside, with the troops under his command, be assigned to him, before they proceed to grant and distribute such lands, under the general authority conferred by the previous dispatch."

The special order mentioned by the Court is as follows:

MINISTRY OF THE INTERIOR.

Most Excellent Señor: Being worthy of all consideration and recompense, the services which Captain Don Andres Castillero has rendered the nation and that Department, coöperating efficaciously in the reëstablishment of order and obedience to the constitutional laws, the most Excellent Señor, the President, orders me to recommend him very efficaciously to your Excellency, and to that Departmental Junta, in order that, before proceeding to the distribution which should be made conformably to the laws, and as is directed in the order of this date, of the lands of the islands adjacent to that Peninsula, there be assigned to that individual the one which he may elect of those nearest to the place where he should reside with the troops which are under his orders.

I have the honor to communicate it to your Excellency for your information and corresponding effects.

God and Liberty. Mexico, July 20th, 1838.

PESADO.

To the Most Excellent Señor, the Governor of the Department of Californias. City of Los Angeles.

Commenting on this order, the Court say:

"Beyond question, the legal effect of that second communication was to withdraw such one of the islands as should thus be selected by the claimant from the operation of the previous order, and to direct that it be assigned to this claimant."

And the Court conclude with the following remarks:

"Having come to this conclusion, the only remaining question is whether the grant was made by competent authority. Direction was given to the Governor and the Departmental Assembly, in the special dispatch on which this grant was issued, that one of the islands situated along the coast of the Department should be assigned to this claimant, before they proceeded to grant and distribute such lands under the general order. Those communications were of the same date; but it is obvious from the language of the

special dispatch, that it was issued subsequently to the other communication, and must be regarded as qualifying the latter, so far as their terms are repugnant. Had the claimant petitioned for a grant of this description, under the general order, his application would have been addressed to the discretion of the Governor and of the Departmental Assembly, and unless both had concurred in granting the prayer, his application would have been defeated, for the reason that such a title could only be adjudicated by their concurrent action. Power to refuse such application was vested in the Assembly as well as in the Governor; but when both concurred, and the adjudication has been made, the title papers were properly to be issued by the Governor, as an Executive act. As the Assembly was a constituent part of the granting power under the general order, it was doubtless thought proper that the withdrawal of one of the islands from its operation, and the disposal of it in another way, should be notified to the Assembly as well as to the Governor. They were accordingly directed not to proceed to make adjudications under that order, until the assignment of the title to this claimant was perfected; but they were not required to make the assignment, or to cause it to be made. To accomplish that purpose, and to carry into effect the command of the President, two things only were necessary to be done: one was to be performed by the claimant, and the other was a mere ministerial act. It was the claimant who was to make the selection; and if it was a proper one, near the place where he was stationed with his troops, nothing remained to be done but to make the assignment, as described in the dispatch. Emanating, as the dispatch did, from the Supreme Power of the Nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the Department. Neither the Governor nor the Assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the Supreme Government. Nothing, therefore, remained to be done after the selection by the claimant, but to issue the title papers; and that was the proper duty of the Governor, as the Executive organ of the Department. No doubt appears to have been entertained of the justice of the claim, either by the Commissioners or the District Court; and in view of all the circumstances, we think their respect-

ive decisions were correct. The decree of the District Court is therefore affirmed."

The Supreme Executive directed the Governor and Assembly to grant to Castillero any one of the islands he might select. And although, as the Supreme Court hold, the sixteenth Article of the Colonization Law did not vest the President of Mexico with power to grant the *islands* in colonization, they not being within the scope of the law, yet by virtue of his extraordinary powers he might dispose of the public domain. And they say, that such an order as that in favor of Castillero, emanating from the granting power, and directed to his agents, was to all intents and purposes a grant. Of course, it matters not whether the power to dispose of the public domain was vested in the President of Mexico by Act of Congress, or came to him by revolution and usurpation; whether the power was ordinary or extraordinary. The gist of the thing is, that an order was issued by the principal to his agent—by the President of Mexico to the authorities of the Department of California. The will of the principal was manifested, and if the steps directed to be taken by agents to carry it into execution were not followed, nevertheless the will shall not fail in any of its intended effects. What ought to have been done, and would have been done, shall be held as done. Beyond question, this decision is sustained by reason, justice and practical good sense.

If, then, the Castillo Lanzas dispatch does not contain words of grant by the President of Mexico, (which I hold it clearly does) but is merely an order (as the Government contends) issued by him to the Departmental authorities of California, directing them to make the grant of land in question to Castillero, it is nevertheless on the authority of the Supreme Court a good and valid title. Whether it be in itself a grant, or merely an order for a grant, *its legal effect as title is the same*, and it is *valid* if the President of Mexico had the power to make the grant, or to order it to be made.

I think I have shown that the sixteenth Article of the Colonization Land of 1824, the law of the fourth of April, 1837, and the decree of the eleventh of March, 1842, conferred on him such power.

But if the point were even doubtful, to which side, according to the soundest principles of construction, should the Court incline? Ought they not to sustain the acts of the highest magistrate of a

nation in disposing of a small part of the public land for objects connected with the national welfare; and before they hold such an act to be void for want of authority, should they not require the clearest proof that the President of Mexico had transcended his power?

The Castillo Lanzas dispatch proves that the President of Mexico, the Junta de Fomento, the Minister of Justice and the Minister of Relations, had no doubt of the existence of the power which it undertakes to exercise. The authorities of California never doubted that all their power to grant lands in colonization was derived immediately from the President of Mexico. All the laws that have been cited show with what great powers over the disposal of lands in colonization, even in the States, the President was vested; and in the Territories that his power over the subject was exclusive, and absolute also. Towards the power contended for we are borne by a strong current of reason, authority and law, which is opposed by nothing. I do not see how its force can be resisted.

To such currents Courts yield themselves with pleasure.

"This or no other Court," say the Supreme Court in the Arredondo case, (6 Pet. 728) "can require proof that there exists in every Government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officer or tribunal who exercises it by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior power, and respected by all coördinate and inferior officers and tribunals throughout the State, colony, or province where it lies."

And again they say, page 726: The United States "have submitted to the principle which prevails as to all public grants of land, or acts of public officers in issuing warrants or orders of surveys, permission to cultivate or improve, as evidence of inceptive and nascent titles; which is, that the public acts of public officers purporting to be exercised in an official capacity and by public authority, shall not be presumed to be a usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the public

domain, did it by the order and consent of the Government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country, especially in the States whose tenures to land depend on every description of inceptive, vague and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal."

It may be said, admitting the power of the President to make the grant or to give the order for one, contained in the Castillo Lanzas dispatch, there is this difference between the case of the Island of Santa Cruz and the Two League Grant—that the first was not made in pursuance of the general system of colonization established by the law of 1824, and Regulations of 1828, while the latter was; and that if the order of the President had been obeyed by the local authorities of California, certain conditions would have been inserted, obligatory on the grantee to fulfill.

Very well. Let us subject Castillero's title to the test of what is provided by the laws and dispositions on the subject of colonization. What was the plan of operations proposed by the law of 1824, and the regulations of 1828, and evinced by the practice of the local authorities of California? It was, beyond doubt or question, this: The Political Chief was to accede to the Colonist's petition, and the Territorial Junta to approve of what he had done. The concession being thus definitively made, a document of title was to be signed by the Political Chief and delivered to the grantee, who, on applying to the proper Magistrate for the survey and possession of his land, would have its boundaries marked, and receive juridical possession of it. All the conditions of the grant were, and must have been, conditions subsequent. By this method, the rights of the nation and those of the colonist were both protected. The colonist had a perfect title. The nation secured the settlement, cultivation, inhabitation of the land; in one word, the fulfillment of all the conditions of the grant, by subjecting it to defeasance, in case they were not complied with. The possession of the land by the colonist was not to be taken until he had received a definitively valid title; nor was he to do any act in consideration of the grant, before receiving title and possession.

If, therefore, Castillero had received such a grant as is provided

for by the laws and dispositions relating to colonization, it would have been a definitively valid one in full property, evidenced by a document of title signed by the Governor of the Department, and containing directions to the local Magistrate to put him in possession. If, according to the decision in the case of the Island of Santa Cruz, all this must be considered as having been done, wherein does the title lack validity? Because Castillero did not comply with such conditions subsequent, as would have been actually made? That objection will scarcely be urged at this day.

But the real purpose of Castillero's grant was not colonization. He tells the Government that he wants wood for his burnings, and a grant of two leagues of land around his mine, to supply that want. The grant was made for the purposes of the mine, to encourage its development, to assist its discoverer. The land was already occupied, built upon and inhabited. The mine was in the middle of it —the hacienda was included in it—all the objects of colonization, as far as they concerned that piece of land, were already affected, all its purposes already accomplished. Therefore, if the local authorities of California had actually delivered to Castillero the document of title contemplated by the Regulations of 1828, it is very unreasonable to suppose that any of the usual conditions relating to the building and inhabiting of a house would have been inserted, or that there would have been any conditions to the grant. There was certainly no law or disposition on the subject of colonization requiring any condition to be annexed to a grant made under such circumstances.

Castillero's grant, like Alvarado's, in the Fremont case, was made in consideration of services rendered the nation. But unlike Alvarado's, and disconnected from all considerations of mere settlement, Castillero's grant was a part of the scheme of development of a mine, in which the whole Republic was deeply interested, and may be regarded as having been made as much for the benefit of the nation as of Castillero. What great additional force does the last suggestion give to the reasoning of the Supreme Court in the Fremont case, where they say: "And the grant was not made merely to carry out the colonization policy of the Government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers.

And, although this cannot be regarded as a money consideration, making the transaction a purchase from the Government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration, the title in a Court of Equity ought to be as firm and valid as if it had been purchased with money on the same conditions."—17 Howard, 558.

The equitable principle here established by the Court, also directly sustains Castillero's grant, under the law of the fourth of April, 1847. If the President of Mexico had sold these two leagues to Castillero for a dollar and a quarter an acre, he would have acted strictly according to the directions of that law. But the services, in part recompense of which this grant was made, were worth greatly more than that sum of money, while it is not to be forgotten that the grant being intended to help the development of the mine, must be regarded as having been made partly, if not principally, for the benefit of the nation.

But I will not be over exquisite to cast the fashion of imaginary objections, nor with too nice sense follow the fine spun threads of subtle disputation. Much more congenial to me is it to reason directly from broad and substantial premises to positive conclusions; to surrender my mind to the active, constructive working of human affairs, and to leave my conclusion from them to depend on its logical connection with them, than to seek to hedge it off from the captious objections of a destructive spirit, and to shield it from all the tiny weapons which ingenuity never fails to supply even against the plainest and grandest truths.

According to my construction of the Castillo Lanzas dispatch, here is a plain grant by the President of Mexico of two square leagues of land to Andres Castillero, situate around the mine he discovered. The grant is made to the discoverer, partly in reward of the splendid service he had rendered the nation by unsealing a hidden fountain of wealth, as precious to Mexico, as rain, and dew, and perennial stream, to the nations that live by tillage. Partly to reward Castillero, but principally to stimulate the development of his mine, and to hasten the day when the beneficent supply of metal, which nature had then provided, should be made available to the great mining interest of Mexico, which was languishing in the dearth of it. These two square leagues to Castillero, to furnish

wood for his burnings; why, any body might have had them for the asking! Surely there was never a grant better deserved by its recipient, and never did any nation, in a purely selfish point of view, more profitably dispose of two square leagues of land. In 1846, quicksilver, at a very low average sold in Mexico for one dollar and a half per pound. For several years past, thanks to Castillero's discovery of the mine of New Almaden, seventy-five cents a pound may be regarded as a very high average price. Mexico consumes about sixteen hundred thousand pounds per annum. Here, then, is a saving of more than one million, two hundred thousand dollars a year to the miners of Mexico, in the article of quicksilver alone. And when we consider that at this low price, many mines of the precious metals may be profitably worked, which could not have been touched without loss in the days of the Rothschild monopoly, we may form some idea of the vast benefits which Castillero, with his mine, and his mining possession, and his two square leagues, conferred on his country, notwithstanding all of them, save himself, are no longer "within the limits of the Mexican Republic."

Professing to occupy, in relation to this public benefactor, the very position of his own country, the United States deny that the discovery was made, deny that Mexico would have deemed it a valuable one, deny the genuineness of all of Castillero's title papers, deny the power of the Sole and Supreme Ruler of Mexico to make him a grant of two square leagues of land around his mine, to furnish wood for his furnaces; and when met by a plain decision of our own Supreme Court, in a case precisely similar, resort to all the little arts of sophistry as an excuse for injustice and perfidy.

Grateful it is, under all circumstances, to defend the right; but when it is attacked by such an adversary, and with such weapons, the task is also melancholy in the extreme. It is for the Court, to whom our Government has entrusted its conscience and its honor, to redeem the plighted faith of the nation, and recompense, by the full measure of justice speedily rendered, the wrongs of error, regardless of the swarm of little objections which owe their origin to the fecundity of sophistry and injustice.

Let us not forget, that while the United States have succeeded to the obligations of Mexico to Castillero, they have fully shared

with that nation the benefits of his great discovery. Ask the miners of Mexico, of California, of Nevada, and of Oregon, what would be their condition if Almaden in Spain were now, as formerly, the only great source of supply of quicksilver—if that metal, as would be likely the case, with the increased demand, sold for two dollars and a half a pound, instead of fifty or sixty cents—and their reply will satisfy you that the New Almaden mine, by lowering the price of quicksilver, and thereby increasing the production of the precious metals, is worth more to them every few months than the mine itself would sell for.

Extraordinary Powers of President Paredes.

Having given my views of the statutory power of the President to make this grant, I shall briefly consider the powers of President Paredes under the Military Government of which he was chief.

From the epoch of the overthrow of the Constitutional Laws of 1837 by the revolution of 1841 to the present time, the Government of Mexico has been revolutionary or usurped, and the Presidents have exercised dictatorial powers, though occasionally checked for a few months by the interference of Congress, or by temporarily acknowledging the limitations to their authority fixed by some constitutional basis or plan of political organization. Congress has generally exercised only a mere semblance of authority, and as soon as it interfered with the acts of the military and political chiefs, was either disbanded or dispersed by armed forces or a revolution. So of the Executive; at one time revolutionary, military or usurped; then legalized, limited and *quasi* constitutional; then again revolutionized and dictatorial. In fine, the entire government—Presidents, Congresses and political organizations—has been irregular and of ill-defined powers, generally exercising a mere *de facto* authority, without the slightest claim to be a government *de jure*.

Under such circumstances, when the great mass of parliamentary power inherent in bodies politic having no constitutional organism is not digested into system, distributed into branches, and expounded by the lessons which experience draws from a continuing order of things, it is in the highest degree unjust and illogical to test the legitimacy of the acts of the governing power by the principles which apply to those of a regular constitutional government, whose

plan is matured by practice, and all of whose steps have come to be sanctioned by precedent.

The distribution of power among coördinate branches of government, each of which has its appropriate and exclusive functions, whether defined in written constitutions or resulting from the natural order into which affairs of government, when wisely conducted, will certainly fall, is the highest success of political wisdom, and the surest sign of a constant people, virtuous and self-governing.

The slightest departure from constitutional order is followed by a derangement of power; by its centralization in the hands of the Executive. The constant tendency of power is to slip from the hands of the many into the hands of the few. The first vice of disorder and revolution is to strip Legislatures of their entire power, and transfer it to a King, President or Leader.

The natural and inevitable result of the condition of affairs which has prevailed in Mexico for the last twenty years, is to break down the barriers which constitutions would wisely interpose between the Legislature and the Executive, and to transfer all the power of the former into the hands of the latter.

When revolutions are frequent, it is Chieftain who succeeds Chieftain; not Congress, Congress. For the supremacy of legislative over executive power can exist only in a conservative and stable government. So thoroughly is this principle understood even among a people inured to revolution, that each military chief who attains the ascendant holds out to the nation as an earnest of permanency and constitutional order the prospect of a constituent Congress, which is to recast the government in an enduring form, and to establish legislative congresses for all time to come.

But in Mexico, with whom revolution, usually regarded as a heroic remedy, seems to have become a chronic disease, we must look to the man who for the time being is at the head of affairs, as the repository of the powers and obligations which belong to all bodies politic. If we do not find it in him, we shall find it nowhere.

I think I may safely assert it as a sound legal principle, that in a nation like Mexico, where for the last twenty years there has been nothing but continual disorder and successive revolutions, the presumption of law would be that the legislative and executive powers of government, at any given time, are in the hands of the

military chief who controls affairs. Such presumption would be grounded on probability and the natural course of human events.

The "Bases Organicas" formed by a junta of notables and proclaimed on the thirteenth of June, 1843, satisfied neither the old federalists nor the ultra centralists. Santa Anna and Canalizo continued to exercise dictatorial powers till June 4th, 1844, when the "Bases Organicas" were nominally put in force as the rule of government. The differences between Santa Anna and Congress, however, led to the disbanding of the latter, and finally to the overthrow of the former; and at the end of the year, Herrera assumed the reins of government, first as the Executive, *ad interim*, and then as constitutional President under the "Bases Organicas."

Another revolution followed. On the fourteenth of December, 1845, the generals, chiefs and officers of the Army of Reserve, and those of the garrison of that department, assembled in the city of San Luis Potosi; and setting forth the evils which the existing government had brought upon the country, resolved to subvert it, and to establish another on the following plan.

PLAN OF SAN LUIS POTOSI, FOURTEENTH OF DECEMBER, 1845.

"First. The army sustains with arms the protest which the Nation makes against all future acts of the present administration, and henceforth they shall be null and of no force.

"Second. The present Chambers of Congress and the Executive power, not being able to continue in their functions, shall cease to exercise any of them.

"Third. As soon as the army shall occupy the Capital of the Republic, there shall be convoked an Extraordinary Congress, *possessed of full power to constitute the Nation, with no limit to their august functions.*

"Fourth. In the formation of that Congress, all classes of society shall be represented.

"Fifth. When it shall be installed and shall enter upon the exercise of its high powers, it shall organize the Executive power; and there shall be no authority which does not exist by its sovereign sanction.

"Sixth. In the Departments, the persons now in authority shall

be continued, until replaced by those whom the Nation's representative shall appoint.

"Seventh. The army names for its Chief in this movement, The Most Excellent S^r. General of Division, D. Mariano Paredes y Arrillaga, who shall be immediately invited by a committee appointed from this body, which shall remain in permanent session until his determination has been made known.

"Eighth. Another committee shall be appointed to invite the Most Excellent S^r. Governor and Assembly of this Department to give in their adhesion to these propositions.

"Ninth. The army protests in the most solemn manner that it does not think, and never will think, of the (permanent) elevation of the Chief it has elected.

"Tenth. It declares, also, that it will inflict exemplary punishment on all who with arms oppose this Plan."—*Lafragua's Report, Appendix No.* 33, *p.* 69.

Paredes assumed the leadership, and on the fifteenth of December, 1845, issued a manifesto to the Nation, from which I make the following extracts:

MANIFESTO OF GENERAL PAREDES TO THE MEXICAN NATION, FIFTEENTH OF DECEMBER, 1845.

[EXTRACTS.]

"On commencing the task which the declaration of war and the will of the people has confided to me, my first care is to direct my voice to the Nation. A soldier of the country which has elevated me to a position beyond my merits, it is proper in such solemn moments as the present that I render an account of my conduct, of my projects, and of my intentions.

* * * * * * * *

"The condition of the Nation bears witness how these hopes have been realized, how those promises have been fulfilled! Selfish parties, without patriotism and without faith, have succeeded to the

command, in order to tyrannize over and to ruin the Republic. Civil discords have consumed its strength; demoralization has entered into society: for twenty-five years have we been attempting every class of systems, and this period has been marked by continual revolutions; and what fruit have they given us? If we examine our position in its exterior relations, we have seen the Nation insulted, and then humiliated by the arms or by the policy of foreign powers. The weak and impoverished Governments which have come into power have permitted Texas to be wrested from the Nation; and now, in attempting to reconquer the rebel Department, the Republic is threatened by a war with a powerful State.

"Our relations with other powers are far from being satisfactory; and our neighbors publicly predict, and the politicians of Europe repeat the same, that the North American stars will soon wave above the towers of Mexico, and be carried to the Isthmus of Panama. Such an opinion has been formed by the world from our divisions, from our weakness and misery.

"If we take a view of our interior condition, we find only chaos and anarchy. The Republic in all parts is dissolving! Texas has been separated from the National Union; the revolutionists of other Departments, speculating on the weakness of the Government, openly preach insurrection; the Government, ruled by factions, and occupied only with its miserable quarrels, abandons to the sanguinary incursions of barbarians our frontier Departments. The army, diminished and every day more neglected, is incapable of meeting the exigencies of internal security, and those of a foreign war; its sufferings and its constancy are put to the severest tests; the soldier is hungry and naked; the military administration is found in the most lamentable state of abandonment. The Treasury, sufficient in former times to maintain with dignity all the functions of government, has been the victim of covetousness and empiricism; the old servants of the Republic, the magistrates and the army, are lying in misery, while in Mexico and some of the Departments colossal fortunes are every day suddenly made. Our financial condition, both at home and abroad, is bankruptcy. We are consumed by a debt which is augmenting every day, and threatens to engulf in its bosom the public fortune. The revenues of the Nation are pledged to its creditors, and the Government finds itself obliged, every hour, to beg

from the usurer a miserable pittance for the support of the garrison of the capital; the scales of justice have been distorted in partisan hands; and we have recently seen seditions consecrated in solemn decree. Our agriculture perishes for the want of protection and security; while our commerce, visibly decayed, is abandoning the coasts which in former times it promised to populate and enrich with its wealth.

"This picture, sad as it is, is unfortunately not exaggerated. It is a faithful transcript of what is thought and what is lamented by all observing men. Let us consider what we have been, what we ought to be, after twenty-four years of independence, and compare it with our present situation. In vain, under the pretext of remedying this condition of affairs, have revolutions every day occurred; revolutions instigated from personal motives have had no salutary effect on affairs; every day the Congresses and the Presidents have been changed, but the evil has remained the same, and the same scandalous abuses have followed, consuming the substance of the country.

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"In marching upon the capital for the purpose of carrying out the glorious enterprise committed to my care, I most solemnly declare, in the presence of the Nation, that we do not contemplate a revolution of *persons:* that we aspire to something more grand, more beneficial, and more complete. It is not intended to usurp a presidency, nor to restore a congress; it is intended to call upon the Nation, in order that without fear of turbulent minorities it may constitute itself according to its own will, and construct a barrier against the dissolution that threatens it from all parts; it is designed to prevent power from falling into the hands of revolutionists, that the country may not, as in times sad to be remembered, be scandalized by such excesses; it is designed to return to the producing classes their lost influence, and to give to wealth, to industry, and to labor, the part that belongs to them in the government of society. The nation, wearied by eternal changes, and the fruitless tumult of revolutions, seeing no place of repose in the midst of these great griefs, longs for guaranties of order and stability.

"For this I have decided—for this the army has decided—to make a new revolution, in order that it may be the last, and that

we may commence beneath the shade of peace and internal tranquility to develop the elements of our wealth."—*Appendix to Lafragua's Report*, *No.* 32, *p.* 66.

No sooner had the news of this revolution reached the Capital, than Herrera, the Constitutional President, the Chambers of Congress, and the municipal authorities of the city, determining to resist it, issued appeals to the Nation to sustain the Government established in December, 1844. In his proclamation, Paredes had set forth the evils which the existing Government, and its numerous and short-lived predecessors, originating as they all did in the temporary supremacy of selfish, corrupt and turbulent factions, had entailed on the Nation; and had shown that these grievances could be remedied only by reconstructing the Government on an entirely new basis, with a strength not merely numerical. Herrera's government in turn denounced Paredes in the most unmeasured terms; charged him with treason, *with leaving the beaten track of Mexican revolutions*, (the common law of faction) with subverting not the Government only, but the democratic principles which underlie it, and with the design of establishing a monarchy and filling the throne with a European Prince.

I propose to give some extracts from these various appeals to the Nation, as indicative of the character of the revolution which Paredes headed—as showing what radical changes, what a thorough reconstruction of government on entirely new principles it proposed; and to prove, that if in the frequent and numerous *interregna* of constitutions, which may be said to be the common condition of government in Mexico, the leaders of triumphant factions have ever possessed extraordinary powers, Paredes belongs *par excellence* to that class.

The Constitutional President to the Mexican Republic, December 23d, 1845.

[EXTRACTS.]

"Mexicans:—Although I have just addressed you, it is my duty to inform you more particularly, that the great national work of the sixth of December, 1844, is again threatened. A General who has

become unworthy of belonging to the army, incapable of understanding all the consequences of a new political turmoil in the present straitened circumstances of the nation, but ready to plunge into a revolutionary career, with no other end than to satiate a detestable ambition, has proclaimed sedition in San Luis, has refused to recognize the Supreme Constitutional powers, and has placed in imminent peril, the existence of the Republic. And in order to leave no justification of conduct so criminal, and to stamp himself with the seal of opprobium, with which his name will pass to posterity, he turns his back to a foreign enemy, and draws his sword against the Government at the very moment when he knows, from the General in Chief of the Northern Army, that the American forces are invading our frontier, and that the aid asked of him is necessary and urgent for the salvation of the national honor. What name can we give to that apostacy which thus compromises the dearest interests of the country?"

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"My conduct under such painful circumstances cannot be vacillating. Elevated to the first magistracy by the free and unanimous vote of the people, it is my duty to exercise all the power given me by the laws, and by public opinion, to crush a revolution which can only terminate, if it should triumph, in an opprobius despotism, or a bloody anarchy."—*Appendix to Lafragua's Report, No.* 34, *p.* 48.

THE CHAMBER OF REPRESENTATIVES TO THE NATION, DECEMBER 23D, 1845.

[EXTRACTS.]

"MEXICANS:—A General, to whose fidelity and valor the Government confided the defense of the national Territory, has proved to be a traitor to his country; has turned his back to an invading enemy, and is marching towards the capital of the Republic at the head of the army of reserve, which he has seduced for the purpose of dissolving the constitutional powers, at the very moment when the faithful defenders of the frontier are begging his aid to resist a foreign invasion. Never has Mexico witnessed a treason

equal to this; nor is there found in the annals of her revolutions an apostacy so opprobrious. If such criminality should triumph, to be a Mexican will be sufficient cause for blushing with shame, for our country will be looked upon with contempt by all nations."

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"MEXICANS:—Never was proclaimed in our country a revolution more destitute of justice, or even of pretexts in support of its pretensions. The seditionists desire the world to believe, that since the time that Mexico rejected the empire offered in the plan of Yguala, to the Bourbon dynasty, there has been nothing in the political administration of our country that has not been inconsiderate and undignified. In this is discovered the infamous design with which it is desired to convoke an extraordinary Congress, that it may solemnly declare, before all the nations, that Mexico is still incapable of self-government, and that a foreign dynasty must be established in our country in order that the same may be properly governed. For this it is pretended that that convention shall have no limits to its power, and that it shall constitute the nation under any form of government whatever; for this, in the plans of the factionists, the name of Republic is not once proposed."

"Let the errors committed by the Governments of Mexico be what they may, from the date of the consummation of its independence, no one will deny that the country has progressed, that every day it has advanced in civilization, and that it will unfold all the elements of wealth so bountifully bestowed upon it by the hand of the Creator, as soon as the Government shall be consolidated; when there shall be established that state of liberty and order from which civil war alone can banish us. But surely it is not a foreign dynasty—it is not the establishment of a monarchy—that will conduce to the prosperity and greatness of the country. When our fathers proclaimed their independence; when, in the consummation of this great work they shed their blood on the battle-field, expired upon the gibbet, or died in dungeons weighed down with chains, they did not make such heroic sacrifices in order to leave us a country which we should now be so degraded and debased as to place beneath the sceptre of a foreign prince."

"Republicanism was the spirit that always animated those heroes. The new-born Republicanism struggled against an ancient monarchy

until Mexico was delivered from its dominion; and under institutions also Republican, the nation obtained the last victory which established its independence. One chief alone, who for so many years fought to sustain the Spanish Government, who was educated under the maxims of a monarchy which has always professed absolutism, who has not aspired to the dictatorship, only because he could not exercise it, and who does not profess republican virtues, nor the popularity derived from those virtues; he alone, we say, can aspire to constitute Mexico under monarchical institutions, which even in Europe already give signs of decay and ruin in the misery of the people, and the unhappy condition of the laboring classes. No one save this chief could point out to us a vice-royal Government as a model for a political organization. Mexico will never retrograde to such a belief; neither will it aspire to the turbulent license of demagogueism, nor submit to the humiliation of a colonial government; but will only be content with the establishment and consolidation of a Republican liberty as ample and extensive as may be compatible with good order."

* * * * * * * * * *

"Mexicans! There is yet time to save the country if we are still worthy to form a nation. An unanimous and patriotic effort, such as was made on the great day of the people on the sixth of December, 1844, will be sufficient in a short time to destroy the work of treason and perfidy. Your representatives know their duty and will not grow faint in their efforts so long as they are not abandoned by the people. But if you still hope for any good from the military dictatorship which demoralizes the nation, impoverishes and humiliates them, bow your heads before the sword of the dictator who promises you social perfection, and who commences his work of political regeneration by flying from the enemy that invades the Republic; by abandoning the frontier, the defense of which was confided to him, believing him to be worthy of that glory to which the warriors of all nations aspire."—*Appendix to Lafragua's Report, No.* 35, *p.* 48.

The Senate to the Mexican Nation, December 26th, 1845.

[EXTRACTS.]

"Mexicans:—It is scarcely a year since the Senate, opposing law to despotism—your valor to mere physical force, and the justice of our noble cause to an iniquitous conspiracy, issued a solemn protest against a government which had destroyed its title to legitimacy. Neither the efforts of that arbitrary administration; the use of the Supreme power, which it abused without shame, nor the multitude of partizan agents, interested in the general disorder, were able to overcome the national will, which proclaimed in all parts a restoration of the guaranties, and the fundamental principles of the representative system. The Republic triumphed over its enemies; and without overstepping the limit of the Organic Bases which had been adopted, or shedding a drop of Mexican blood in an obstinate struggle, we beheld the dawn of the day of general reconciliation and hope, as a precursor of glory and happiness to the Nation. Providence crowned with success the patriotism of His children; but He reserved for them a hard and difficult trial, in which they would present to the world a constancy worthy of their independence—or a weakness, which should be transmitted by our history, with all the opprobrium that stains the history of a people governed by ambitious men, without merit and without virtue. A perfidious General, and the Division under his command, threaten your institutions, your well-being and repose, with another Dictatorship, more opprobrious than the preceding one; and the time has arrived when you should strictly adhere to that compact which you swore to maintain in opposition to the same, and to civil war. The Senate, which was not silent then, cannot now hold its peace, and fulfill its obligations of representing to you the gravity and the danger of the present terrible crisis of the Republic.

"The internal revolutions which have taken place; the bastard interests which have been created; the wild ambition of the Chiefs who have sought to establish their influence and power upon the misfortunes of the country, have not yet been sufficient to degrade the people; who, although inclined to a peaceful character, are

resolved ever to combat those unworthy oppressors who may attempt to reduce them to infamy and slavery. If they have at times deceived themselves in relation to their true interests; if they have been patient in adversity, and moderate in the day of triumph, they have still never resigned the right of rending the chains which have been forged for them by men who have ridiculed our institutions, and who, in making a vile traffic of opinions, have professed none. The cry from San Luis Potosi has caused the sad pages of our history to be forgotten; since having no other origin save an insolent treason, it offers to the Mexican Nation no other result than a foreign invasion; the loss of its territory; the ruin of its representative system, and a ferocious despotism or a bloody anarchy. And if, as this plan indicates, (which causes the heart of every true patriot to pulsate with anger) it is intended to put an end to the existence of the Republic, how shall such an act be qualified, and how can words be formed to express the shamefulness of such a project, and the audacity with which a military chief, without any legal titles whatever, attempts to destroy a Republican form of Government in one of the most important States on the American Continent?"—*Appendix to Lafragua's Reports, No.* 35, *p.* 47.

THE AYUNTAMIENTO OF MEXICO, TO THE INHABITANTS OF THE MUNICIPALITY. DECEMBER 23D, 1845.

[EXTRACTS.]

"A revolution, the most insolent and shameful of all that have ever distracted our unhappy country, has just broken out in San Luis Potosi, proclaiming the infraction of all law; the destruction of all order; the debasement of the people, and the contempt of the Mexican name. An ambitious general, a perfidious and sworn enemy to liberty, has infamously turned against the government the very arms it had placed in his hands for the defense of the National territory; and the army of reserve, a large portion of which is composed of those who a year since followed the accursed standard of the Dictator, has cowardly turned its back to an invading enemy, and come to spread desolation and ruin in the bosom of the country which has maintained and honored it.

"The recent revolution, fellow-countrymen, is not of a character similar to those that have preceded it: since in all of these, it has only been attempted to establish a political communion, more or less popular, or a principle more or less liberal; but that of San Luis Potosi, which is probably only the development of that which was initiated in Tacubaya, throwing aside the mask that concealed it, does not come, as others have done, to strip the tree of liberty of some of its branches only, but to tear it up by the very roots. It does not propose, as heretofore, to extend or restrict the local powers; it is proposed to destroy it entirely; it is proposed that we shall change the title of citizens for that of vassals: it is proposed that the baton of the First Magistrate, converted into a sword, in the hands of a dictator, shall soon become a sceptre in the hands of a foreign monarch: and selling in a shameless market every principle of decency, every sentiment of honor, every idea of dignity; it is proposed, finally, to establish an Empire upon the ruins of the Republic.

"To arms, then, Mexicans! The question that agitates us today is not a mere party strife, since we do not alone seek to obtain a greater amount of social good, but to defend what we already have. It is a question of life or death; because it strikes at the existence of the representative republican system; because it is finally to decide, if the unhappy country of Hidalgo, of Morelos, of Iturbide, and of Guerrero, merits the name of a people. To arms, Mexicans! And that the sun of the sixth of December may again shine upon us, remember that, by the force of your will alone, you then laid low the man of Tacubaya! that in the black book of his crimes, there are at least two bright pages—Tampico and Vera Cruz. Remember it fellow-citizens, and calculate the fortune which awaits that soldier who cannot place even these titles in the balance."—*Appendix to Lafragua's Report, No.* 36, *p.* 48.

But all the efforts of Herrera's government were unable to check the progress of this revolution. On the morning of the 29th December, the Capital itself pronounced in favor of the plan of San Luis Potosi; and Paredes entered at the head of his army. The existing government was dissolved.

This movement in the Capital was first headed by Gen. Victoria;

but on the second of January, (1846) the Generals of the Army, the Chiefs of Battalions, and many of the leading statesmen of Mexico, among the rest, a number of the Representatives who had signed the proclamation against Paredes, assembled in the Hall of the Palace, to consolidate the Revolution, and to adopt a system for the reconstruction of constitutional government conforming to the principles established by the Plan of San Luis Potosi. That system was proposed—or I should say dictated—by Paredes, who addressed the assembly, and offered a Plan which lacked only two votes of being unanimously adopted. But as I prefer to let the actors in this revolution utter their own sentiments, and to construct my argument with the very words of the times of which I treat, I give the proceedings of that assembly as they were recorded.

GENERAL ACT OF THE ARMY, SECOND JANUARY, 1846.

"In the city of Mexico, on the second day of the month of January, 1846, the Señores, Generals of Division and Brigade and graduates being assembled in the general Hall of the Palace, and the Chiefs of Battalions being present, convoked by his Excellency, the Señor General-in-Chief, Don Mariano Paredes y Arrillaga—His Excellency opened the session with the following address:

"GENTLEMEN: In consideration of the favor dispensed to me by my companions in arms, adopting the principles proclaimed at the head of the Army of Reserve on the fourteenth of December of the last year, in order to rescue the country from the abyss of anarchy, of disorder and ignominy in which it was about to be plunged by the errors and obstinacy of the persons discharging the duties of the public administration, for the purpose of explaining my opinion as to the best mode of terminating the present crisis, my sentiments being always favorable to national liberty and to the guarantees of the citizens, I propose for the deliberation of this respectable assembly the following propositions, in which I do not express so much my own judgment as what I understand to be the opinion of a majority of the inhabitants of the Republic, which I considered it my duty to respect in San Luis Potosi, until it shall be heard and known in the progress and march of events.

"I solemnly protest to the Assembly the entire liberty which it enjoys, and my submission to its prudent resolutions."

General Paredes then offered the following, being

THE PLAN OF THE SECOND OF JANUARY, 1846, AMENDING THAT OF SAN LUIS POTOSI.

"1st. The citizens heretofore exercising the legislative and executive powers have ceased in the exercise of their functions, because they have not fulfilled the desires nor met the exigencies of the nation; because they have not sustained the dignity of its name, nor maintained the integritry of its territory, in accordance with Articles 1st and 2d of the Plan of San Luis Potosi of the fourteenth of December, 1845.

"2d. An assembly of representatives from the Departments, composed of two natives or residents of each, and appointed by the General-in-Chief of the Army, will immediately elect the person who shall discharge the Supreme Executive power until the meeting of the extraordinary Congress, which is to organize the Government in accordance with Article 3d of the Plan published in San Luis Potosi on the fourteenth of December, 1845.

"3d. The Assembly of representatives will be dissolved as soon as it may have elected a President, and received from him the oath to sustain the independence of the nation, the republican system of popular representation, and this administrative plan of the Republic.

"4th. The powers of the President *ad interim* are those that are given him by the existing laws, and he can only exceed them *for the purpose of preparing for the defense of the national territory, respecting always the guaranties established by the existing laws.*

"5th. The Ministers of the President *ad interim* are responsible for his acts to the first Congress, *but these acts shall not be revisable at any time.*

"6th. The President *ad interim* will issue within eight days after he may have taken possession of his office (the *convocatoria*) for the assembling of the extraordinary Congress, which will meet within four months in the capitol of the Republic; and upon issuing its constitution, the principles and guaranties which it shall adopt for its internal government shall not be touched or altered.

"7th. The present Council shall be maintained, in order that the President *ad interim* may consult with the same in all important affairs of state.

"8th. Only such authorities of the Departments shall cease to exercise their functions as may oppose this plan for the regeneration of the Republic, and they shall be replaced in accordance with the laws creating the same.

"9th. The Judicial power will perform its important functions in accordance with law, without any variation whatever.

"10th. No one shall be prosecuted on account of his previous political opinions.

"On concluding the reading of the foregoing articles, the Most Excellent Señor Don José Ma Tornel proposed that two secretaries should be appointed from the Assembly, and thereupon His Excellency the President thereof appointed General Don Pedro Ampudia and Don Antonio Diaz de Bonilla.

"Whereupon said Articles were put to discussion, and several members having spoken in favor and against the same, they were approved by all save the Señors Generals Don Lino José Alcorta and Don José Vincente Miñon; whereupon this act was concluded, the Most Excellent Señor General-in-Chief of the Army, who presided over the Assembly, and the following gentlemen signing the same."—*Appendix to Report of Lafragua, No.* 37, *p.* 48.

Paredes, on the same day, appointed the Junta, which forthwith unanimously declared him President, *ad interim*, of the Republic; and on the third, administered to him the oath of office, and on the fourth, dissolved.

Mexico was thus restored to her normal condition; a military chief her ruler; the force of an army his sanction: a constituent Congress in embryo; and a Constitutional Government *to-morrow*.

One of the planks in the platform of San Luis Potosi—a germ of regularity always found in the bosom of Mexican revolutions, even the most radical—was the promised convocation of a constituent Congress. Paredes, loyal to his platform to a degree that would have commended him to the politicians of our own country, on the 27th of January issued a *convocation* of an Extraordinary Congress,

organizing an electoral power by classes, and establishing, as Lafragua says, a species of aristocracy in Mexico.

This decree of convocation is really interesting, as an attempt to establish Government on an entirely new basis. It proceeds on the theory that the convention should represent all classes of *interest* and *industry*—and that a certain number of its members should be elected by each class. I quote the fourth article. The whole number of Deputies was to be one hundred and sixty.

ART. 4. To each one of these classes shall belong the following number of Deputies:

To Country and City Property, and Agricultural Industry	38
To Commerce	20
To Mining	14
To Manufacturing Industry	14
To Literary Professions	14
To the Magistracy	10
To the Public Administration	10
To the Clergy	20
To the Army	20

"These Deputies shall be appointed by the individuals belonging to their respective classes, according to the peculiar mode of election which shall be specified in the corresponding Articles."

The decree then proceeds to confer the elective franchise, limiting it by numerous qualifications; and under the head of each class to assign to the various Departments their corresponding quota of Deputies. Some of these classes—the Mining for instance—were to elect their Deputies *directly;* others, as the Agricultural and Commercial, were to select electors by whom the deputies were to be appointed.

This decree was thoroughly organic and fundamental. It was the law of the being of the constituent Congress, without whose sanction no authority was to exist in Mexico. It was the highest exercise of absolute political power. It was perhaps the most *extraordinary* power that could be conferred on an individual.

The Congress thus called into existence did not assemble until the sixth of June, 1846. As might have been expected, it disappointed

the hopes, and frustrated the plans of its creator. It was composed of the members of the different political parties. With such discordant elements, there seemed little probability that it would agree upon a Constitution. It was therefore deemed proper to place some restrictions upon the dictatorial power of Paredes; and accordingly, on the tenth of June, that body passed a decree for the establishment of a new Provisional Government, to consist of a President and Vice President; this "executive provisional power" being authorized to use the extraordinary powers (*facultades*) given in Article 198 of the "Bases Organicas." Articles 85, 89, and 90, of the same Bases, were also, with some modifications, declared to be in force. Paredes accepted this Decree, with General Bravo as Vice President, and continued to act under it until the twenty-ninth of July, when he surrendered his powers to Bravo, and resumed the command of the army.

The project of establishing a monarchy by this extraordinary Congress having failed, Bravo, on the third of August, attempted a counter revolution, by presenting to that body a project of a decree reëstablishing the "*Bases Organicas*" as the political Constitution of the Republic. (*App. to Lafragua's Rep. p.* 43.) This attempt to reëstablish the very system which had so recently been abolished, immediately led to the overthrow of Bravo's government, and the dissolution of Congress.

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Plan of the Citadel—Fourth of August, 1846.

On the following day (August 4th) the army and leading men assembled in the Citadel, and adopted a new Plan, providing for the dissolution of the existing Congress; the convocation of a new one, to form a Constitution; the recall of Santa Anna, and the prosecution of the war against the United States. It recognizes the continuance of a Provisional Executive Government, until the meeting of the new Congress, but says nothing respecting its powers, except to provide means for carrying on the war. The only articles referring to the executive, are the third and fourth, which are as follows.

"3d. Until the Sovereign Congress meets, and decrees what may be convenient for the war, it shall be the imperative duty of

the Executive to dictate what measures may be urgent and necessary to sustain with credit the national flag, and to comply with this sacred duty without losing a single moment.

"4th. When the liberating forces have occupied the capitol of the Republic four months, the Congress spoken of in article first should be assembled, for which purpose it shall be the duty of the General-in-Chief to issue the convocation in the terms indicated, and to take care that the elections are held with the greatest possible liberty."

No person was named President; but it was evident, from the recognition of Santa Anna, in the second Article, as General-in-Chief of all the forces, that the office was intended for him.

Salas in Power.

On the morning of the sixth of August, however, an arrangement was made between General Bravo and Salas, by which the former turned over the command of the troops in the palace to the latter, who immediately assumed the reins of government as Provisional President, and on the same day issued his proclamation ordering an election of the new Congress to form a constitution. "In the meantime," he says, "this cessation of the former pacts is indispensable, for all have either the mark of nullity or the repugnance of a part of society; but the *common laws in force*, and those which the Provisional Government proposes to publish, will, in some manner, fill up the vacuum which the situation requires." —*Appendix to Lafragua's Rep. p.* 108.

It thus appears that the powers of Salas were at this time essentially the same as those which Paredes had exercised between the second of January and the tenth of June; both were provisional executives, with no defined powers, acting under no constitutional restrictions, but both recognizing the laws in force (*las leyes vigentes*). There was, however, this difference—that while the Ministers of Paredes were responsible for his acts, *the acts themselves were not revisable;* but no such guaranty was given to the acts of Salas; they were subject to the ordinary rules, and therefore revisable, except so far as respects rights acquired under them.

The party of Salas was as much opposed to Plan of Tacubaya and the "Bases Organicas," as had been that of Paredes; but, while the latter, as generally supposed, sought to establish a monarchy, the former wished to recur to the federal organization on the general basis of the constitution of 1824. The leaders of this party were well known *federalists*, who had always opposed the central government of Santa Anna. In order to prove to the people that he did not desire to govern as a dictator, in the absence of all constitutional restrictions, Salas employed Lafragua, a well known federalist, to embody in a single law or decree all the dispositions respecting the rights of citizens and individual guaranties to be found in the constitution of 1824, the project of 1842, and the Bases Organicas, in order to present them to the new Congress as the basis of the government of Salas and of the proposed new constitution.—*Lafragua's Report, p.* 54.

Santa Anna at Vera Cruz Declares in favor of the Constitution of 1824.

But while Lafragua was engaged in this compilation, Santa Anna landed at Vera Cruz, and on the sixteenth of August, issued a proclamation declaring that, until the new fundamental law should be decreed, the Constitution of 1824 ought to be established as a uniform rule for the interior administration of the Departments.

Constitution of 1824 Proclaimed by Salas.

Accordingly, and in order to unite the federalists and the personal friends of Santa Anna in support of his government, Salas, on the twenty-second of August, issued the following decree.

"Art. 1st. Until the new constitution is published, that of 1824 will be in force, so far as not opposed to the execution of the plan proclaimed in the Citadel of this Capital, on the fourth of this month, and so far as the peculiar position of the Republic permits.

"2d. The existence of the Departmental Assemblies and the

present Executive Council not being compatible with the aforesaid fundamental code, they will immediately cease the exercise of their functions.

"3d. Nevertheless, the existing Governors will continue, entitling themselves of the "States," in the exercise of the powers which the respective constitutions give them.

"4th. The Governors of the new Departments which have no particular constitution will regulate the exercise of their functions by the constitution of the State whose capital is nearest.

"5th. As the functionaries mentioned in the foregoing articles have now no legitimate title, it is declared that their existence is only due to the political movement which is going to regenerate the nation; and, consequently, whenever the interest of the same requires, the General-in-Chief, charged with the general executive power, may replace them."—*Appendix to Lafragua's Rep. p.* 116.

The Congress assembled on the sixth of December. On the fourteenth, fifteenth, and sixteenth of that month, Lafragua, as Minister of Interior and Exterior Relations, read his annual report on the condition of the Republic, and, as the organ of the Administration, explained the character and object of the existing Government. On the twenty-fourth of December, Salas resigned his powers, and Gomez Farias became President.

I now recur to Lafragua's Report to learn his opinion of the powers of the Provisional Government of Salas. On page 53, he says: "As there had been proclaimed, not even temporarily, any of the anterior constitutions, the Government exercised the most unlimited dictatorship, for its whole duty was to carry on the war and to convoke the Congress." On page 54, he says: "The Government, as I have said, *exercised a real and most ample dictatorship*, which was to continue until the new constitution should be published, for the powers of the Congress were restricted to the formation of the fundamental pact, and to matters relating to the war. The power, therefore, was not only *centralized, but in a single hand, the authority* of General Salas being, in consequence, *extraordinary*." On page 55, he speaks of "the perils of a period, not short, during which the nation had to submit to a *dictatorship*." And again: "Since the chief of the citadel began to govern the

destinies of the Republic, conforming *as much as circumstances permitted*, to the fundamental code, (constitution of 1824) the object of so many desires," etc. On page 56, in speaking of the Council, he says: "As the attributes of the Council were not specified, that body was really *subject to the will of the Executive*, who might consult it or not." Again, in his circular of October twenty-first, he says that "the Government will observe, *as nearly as the circumstances will permit*, the constitution of 1824. We will adopt with pleasure and execute with assiduous care, whatever projects of progress and improvements are presented."—*Appendix to Lafragua's Rep. p.* 117.

Santa Anna, in his proclamation of August sixteenth, says that "the Provisional Government of the nation, until the Republic is constituted, must continue in the exercise of powers at least *discretional*. This is investing it with a *dictatorship*, always odious, however imperious the circumstances which render it necessary." He therefore recommends that the constituent Assembly already convoked should also be invested with legislative powers. This advice, as already stated, was followed by Salas, who immediately issued a decree to that effect.

I have thus cursorily traced the political history of Mexico, a few months later than the overthrow of Paredes, for the purpose of comparing his powers with those of his successor, General Salas.

The power of both was *essentially military*, *revolutionary* and *extraordinary*, no matter what declarations they might choose to make to the nation respecting its self-imposed limits. With internal disorders and tumults, aggravated by the excitement and pressure of a foreign war, revolution after revolution was a political necessity. until the man was found who united in himself the elements of greatest and most permanent strength. It is therefore a very narrow view to take of the political government of Mexico, at any time within the last twenty years, but especially in the year 1846, to test the power of its military chieftains, for the time being at the

head of affairs, by their promises, proclamations and appeals, as we would an act of our own Congress by the Constitution of the United States. The political condition of Mexico did not admit of constitutional restrictions in any form: no purely military government does. The chieftain who, backed by an army, overthrows a government and usurps power, is by necessity the whole government, and must discharge all the functions of government. The necessities of the body politic, the demands of the army, the irresistible pressure of events require it. What *is*, *must* be—and is *right* for all the purposes of validity and responsibility. In one word, the government is *de facto*, and to its acts should be attributed all the consequences which the experience of the world has attached to such a state of affairs.

But even applying to Paredes' acts the test of legitimacy drawn from his plan of San Luis Potosi: upon what ground can any of them be declared null? The existence of the nation threatened by war with the United States—but still more by faction, corruption, and a thousand indigenous causes of dissolution—what more far-reaching power could have been conferred on Paredes than the power to do whatever might conduce to the defense of the Nation.

To defend the Nation; what a power—what a responsibility! The treasury, taxation, property, public and private, conscription—all these and a thousand other things were in his power, and by his decrees he could direct and dispose of them.

To convoke a convention for the reconstruction of government; to change the basis of power; to deprive millions of Mexican citizens of their political rights, and to limit the possession of those rights to such classes of property and persons as he might deem proper, was the greatest trust a nation could confide to one man.

HIS ACTS SHALL NEVER BE REVISED. What means this, if it does not mean that all his acts shall be held valid. That their validity will never be questioned for any reason. That no succeeding government shall declare them null. That he shall have the power to do whatever he may do. That his will shall stand in his acts, and that his acts, for all purposes, (save one) shall bind the Nation, and be deemed legitimate and discreet.

And what is that *one purpose* for which, *and for which alone*,

his acts may be questioned. It is this. If he should abuse his power and offend the Nation, the Minister through whom the injurious act was done may be punished. To establish the guilt of the Minister, the *motive* of the act may be examined; and this precisely for the reason that its *validity* cannot be questioned. *That* the Nation is pledged to sustain.

If, then, by the Plan of San Luis Potosi, this grant of Paredes to Castillero must be tested, its *validity* is beyond dispute.

That PLAN declares that the Nation shall not question the validity of this grant by any proceeding of inquiry or revision; but that if Paredes committed a political crime in making the grant, Mr. Castillo Lanzas, the Minister through whom he acted, may be punished for it.

There is nothing in the plan under which Salas came to the head of affairs that is comparable, as a grant of power, to the various articles of the Plan of San Luis Potosi, which I have referred to. Yet the Executive and Legislative branches of our Government, within whose province it particularly falls to decide upon the political powers and responsibilities of foreign governments, have both held that Salas possessed extraordinary powers, and that Mexico is bound by his acts.

In 1847 the United States proposed to purchase from Mexico the right of free passage by the Isthmus of Tehuantepec; the Mexican Commissioners replied on the sixth of September, 1847: "We have orally stated to your Excellency that some years ago the Government of the Republic bestowed upon the private contractor (Garay) a privilege relative to this matter, which was soon after assigned, with the approbation of the same Government, to British subjects, (Mackintosh & Co.) of whose rights Mexico cannot dispose. Consequently, your Excellency will not wonder that, on this point, we do not accede to the desires of your Government."

On the second of May, 1851, the Mexican Congress decreed as follows.

"The decree of November 5th, 1846, is declared null, and as having ceased to exist; the provisional government of that period having had no authority in conformity with the powers with which it was invested to dictate such decree."

In reply to the communication of the Mexican Minister enclosing

this decree, and endeavoring to defend it, Mr. Webster, our Secretary of State, August 25th, 1851, said: "It may have been, as Mr. De la Rosa says, that the elevation of General Salas to the supreme power in Mexico was mainly for the purpose of insuring a more vigorous prosecution of the war with the United States. When, however, he became possessed of that authority, it constituted a government *de facto*, submitted to by Mexico, and recognized, it is believed, by other governments as well as that of the United States. Consequently, it is not necessary for the undersigned to inquire into the origin, nature, or limits of that authority. It is notorious, however, that General Salas was a military dictator. As such, on the fourth of August, 1846, he subverted the Government of Paredes, who himself had acquired power by similar means. But, although his power was necessarily arbitrary and unlimited, he asserted, and the undersigned is not aware that this has been denied, that his conduct in assuming and exercising it was sanctioned by a large majority of the Mexican people. It is certain that the Government of that country, as it now exists, was called into being by his mandate. It is equally notorious that his acts were by no means exclusively of an executive character; and that when he exercised legislative power, his right to do so was not objected to, or even the expediency of his decree of the fifth of November, 1846, publicly questioned, until it must have been known at Mexico that citizens of the United States had become assignees of the privileges granted by it."

To the American Minister, Mr. Webster said: "Salas was notoriously a military despot. As such, his proceedings were not merely of an executive character, but he also enacted several legislative measures of importance, which had at least as little relation to the war with this country as the decree in regard to Tehuantepec. It is believed that his authority for that purpose has never been questioned." "But although the decree of Salas has been annulled so far as the legislative power of Mexico may have authority for that purpose, it is silent in regard to the validity of the original and intermediate decrees upon the subject of the Garay grant." Mr. Webster says that these decrees constitute a charter, and that in all civilized countries instruments of this description "are not liable to be annulled at the pleasure of the executive or legislative power."

The laws and decrees of one government might be altered or repealed by its successor; but that rights acquired under them survived their repeal, and could not be divested by any *ex post facto* law annulling such decrees. He considered these decrees and their recognition in 1847, as attaching a responsibility to the Mexican nation which "foreign powers, certainly the United States, cannot allow to be rendered null and void by a change of rulers in that country, or in the policy relating to the subject which new rulers may think proper to adopt."

These views were unanimously sustained by the Committee on Foreign Relations, (vide their report August 30th, 1852) and but two dissenting voices were heard in the Senate, and these based their arguments almost exclusively on the ground that the powers of Salas, in November, 1846, were restricted by the Constitution of 1824.

I propose to conclude with a few short extracts from Mr. Lafragua's report, giving his views of the character of the revolution of San Luis Potosi. I am aware that one military usurper—I do not use the term in an opprobrious sense, because usurpation, no longer an offense against the State, becomes a public duty, when it is an assumption by the strongest, for the benefit of society, of the control over affairs to which he is impelled by the evils of faction and disorder—should not be tried by the Prime Minister of his rival and successor. I do not intend to set up Lafragua in judgment over Paredes. I cite his views merely as those of a distinguished cotemporary, and attribute to his expressions the weight due to the opinions of the large party of whom he was the apologist. Let us hear what he says of Paredes' revolution.

"The revolution of San Luis Potosi, the programme of which is set forth in documents numbered thirty-two and thirty-three, leaving the beaten path of those that had preceded it, ventured to announce a new principle and new measures for carrying it out. In all of our preceding revolutions, a change of persons had been proclaimed, and perhaps a modification of principles; while in that of San Luis, a new social organization was announced, which tended to nothing less than the destruction of the Republican system, and the erection of a foreign throne upon the ruins of our liberty. To carry into execution the antecedent changes which had been proclaimed,

appeals were made to Congresses more or less popular, but which always had a voice as representing the people, or at least localities, since in the legislative Assembly it was still thought desirable to preserve this shadow of representation; but General Paredes determined, at one stroke, to change the whole, intending that classes should be represented instead of persons, from which would necessarily result the triumph of interests instead of a triumph of principles.

"The President represented to the nation the causes and the object of the plan; the Chambers, which still exercised the legislative power, protested against the revolution, and some of these deputations, who were to enter upon the discharge of their functions on the first of January, directed to their constituents similar manifestoes, as also the Ayuntamiento of the City of Mexico, which was dissolved on the same morning of the pronunciamento of the Capital; and as well for the want of this corporation, as on account of the opposition of the Governor and of the Departmental Assembly to its reunion, Mexico for some days was literally without a head. As soon as General Paredes occupied the city, a military Junta assembled, which ratified the plan of San Luis with some modifications, and it is very remarkable that some of the deputies and Senators, who had signed the protest which has been mentioned, should have met in that Junta, and also signed the act by which it was established as a principle, that the representatives of the people had forfeited the public confidence. Such ill-advised measures as these have brought the country to its present sad condition.

"General Paredes found it necessary, in appearance at least, to legitimate his power, and repeating the scene of 1841, he elected representatives from the Departments who appointed him President *ad interim*, and although he had solemnly protested that he would not assume the government, he occupied the Presidential chair during the first days of January, and commenced to carry out his system, directing the Commandants General to take possession of the governments of the Departments, if the respective authorities of the same should refuse to submit to the plan of San Luis. The Assembly of Puebla suspended its session, and the Government of Vera Cruz was removed to Huatusco.

"The proposed *convocatoria* was made during the last days of

January, in which every democratic principle being disdained, an electoral power of classes was organized, the result of which was that a majority of the nation were left without representation—establishing a species of aristocracy, which in Mexico is not only impossible, but ridiculous."

* * * * * * * * * * *

"Various were the acts in which the Government continued, during the first months, to unfold its system; and although neither the time nor the occasion permits me to make a careful examination of the same, still I believe it my duty to indicate those which most directly influenced succeding events. To the end that the progress of the nation might be uniform, and that the Supreme Government might not meet with obstacles, it was determined that the President should appoint the Governors and Assemblies, a measure which was very badly received, because of the entire subjection in which it placed the Departments. The freedom of the press was however the principal victim of the administration; if at first the public discussion of the form of the Government was tolerated and apparently deemed desirable, in a short time that discussion was formally prohibited, giving to the freedom of the press the severest blow that can be conceived; since if at the time of forming the new constitution it was not permitted to discuss through the press the form of government, it would certainly be difficult to engage in any other discussion more appropriate to the circumstances, or which would more affect the general interests. Thus it was that the government of Señor Paredes from that time lost, I will not say its credit, since it never had any, but that consideration which is always awarded to the depositories of power—and how could he expect it, who by protecting the publication of the *Tiempo*, had confirmed the belief sufficiently general, that the only object of the revolution was to establish a monarchy in the country of Morelos, of Ramos, Arispe and of Guerrero?"

The position taken by Mr. Webster, and adopted by the Committee on Foreign Relations, in regard to the powers of President Salas, protected certain valuable interests of citizens of the United States. The correctness of the principles of public and international law invoked to sustain that position does not admit of serious question. But how much stronger might have been Mr. Webster's

argument if the acts, the validity of which he was defending, had been done by Paredes. With what invincible strength would he have argued from the character of the revolution of which the Plan of San Luis Potosi was the programme; from the supreme and absolute power of the Constituent Congress which Paredes was to call into existence; from the critical condition of the nation threatened with foreign war and reduced by internal tumults and corruption to the verge of dissolution; from the general purposes and provisions of the Plan itself, which subverting by military force a corrupt and imbecile government, appealed to Paredes to save and reconstruct the nation; and especially from that clause which declared that while his ministers should be responsible for the acts of his government, *the acts themselves should not be revisable under any circumstances!* In form, a guaranty of immunity to Paredes, and of validity to his acts, that clause expressly establishes a dictatorship. It was perhaps superfluous; for the condition of the country and the place it called Paredes to fill, would of themselves have furnished those guaranties and conferred that power. But there it stands; the pledge of the nation in answer to all doubts and cavils; its solemn foregone judgment on all questions of individual right and national responsibility.

I have thus shown—

1st. That the President of Mexico did actually grant by his own immediate action two square leagues of land to Castillero around his mine, and directed the Governor of California to put him in possession of them. I do not think that Castillo Lanzas' dispatch admits of any other construction.

2d. That the authority of the President to make that grant was ample, whether considered as derived from the Colonization law of 1824, or from the law of the fourth of April, 1837, or from the decree of the eleventh of March, 1842, or as appertaining to Paredes, who was at the date of the grant the sole and supreme ruler of Mexico, by virtue of his extraordinary and despotic power.

3d. That whether the Castillo Lanzas dispatch be construed as a direct grant, or as an order on the local authorities for a grant, its legal validity as a title is the same, on the authority of the case of the Island of Santa Cruz.

Supreme Court of the United States.

ANDRES CASTILLERO *vs.* THE UNITED STATES.

UNITED STATES *vs.* ANDRES CASTILLERO.

ON CROSS-APPEAL FROM DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF of HALL McALLISTER,

Of Counsel for Claimant.

W. H. Moore, Printer.

Supreme Court of the United States.

ANDRES CASTILLERO
vs.
THE UNITED STATES.

BRIEF.

THE UNITED STATES
vs.
ANDRES CASTILLERO.

The claim presented to said Commissioners, and now before this Court for adjudication on appeal, embraces two objects; First: A Mine of quicksilver, or cinnabar, situated in Santa Clara County, and known as the "New Almaden Mine," *including three thousand varas of ground*, measured in all directions from the mouth of said mine. Second: *Two square leagues of land*, situated upon and surrounding said mine.

It is proposed, in this Brief, to consider but one question involved in this case, to wit:—

The jurisdiction of said Board of Commissioners, and of this Court, over said claim, under the Act of Congress of March 3d, 1851, entitled "An Act to ascertain and settle the private land claims in the State of California."

The first section of said Act, as well as its title, declares its object to be that of ascertaining and settling the "private *land* claims" in the State of California, and the eighth section of said Act, in accordance with that object, requires that each and every person "claiming *lands* in California by virtue of *any right* or *title* derived from the Spanish or Mexican Government," shall present his claim to said Commissioners, &c.

The *subject* of abjudication, therefore, submitted by said Act to said Commissioners, and to this court on appeal, is a private "claim" to "*land*," but the nature of such *claim*, as, likewise, the *estate* or *interest*, in the land which the claimant must possess in order to be heard, are in no manner specified, or limited. On the contrary, they are wholly *unlimited*: and therefore, it would seem evident from the mere language of the Act, that a claim to land by virtue of *any* right, or title, legal or equitable, and whether acquired for the purposes of *extracting the minerals therefrom*, or as a site for a dwelling, or for agricultural or grazing purposes, is equally within said Act, and within the jurisdiction of said Commissioners and of this Court.

So, likewise, it would seem, that a claim, derived from either of the former governments, to an *estate*, or *interest*, in land, whether a *conditional*, or an indefeasible estate, whether for term of years, for life, or in fee, is equally within said Act, and within the jurisdiction of said Commissioners and of this Court.

The manifest intention of said Act, and of the proceedings authorized thereunder, would seem to be to ascertain and settle *all* private claims to land, of every *nature*, de-

scription, and *extent of duration*, which had their origin under either of the former governments.

The Counsel for the United States contends, that though a mining title may be property, it is not "that species of property called a private land claim, and submitted to the jurisdiction of the late Board of Commissioners, and of this Court, by the Act of Congress of March 3d, 1851."

If this be so, what becomes of all Mining Titles in California vested under the Mexican dominion? More than twelve years have elapsed since the final ratification of the treaty of Guadalupe Hidalgo, since the definitive cession of Upper California to the United States, and yet, the only legislation of Congress under which these Mexican Mining Titles can seek protection is to be found in the provisions of the Act of March 3d, 1851.

The intent exhibited by the comprehensive language of the eighth section of that statute, hereinbefore alluded to, is made still more manifest by the penal words of its thirteenth section, to wit:—"All lands, the claims to which have been finally rejected by the Commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, *and all lands the claims to which shall not have been presented to the said Commissioners within two years after the date of this Act, shall be deemed, held and considered as part of the public domain of the United States*," *etc.*

Can it be presumed, will it be intended by this Honorable Court, that the United States, in violation of National Law, and in direct despite of express treaty, designed, at the time of the passage of the Act of March, 1851, and for twelve long years, have maintained the base intent, of imposing a forfeiture upon all Mexican Mines, of considering them, in the pregnant language of said thirteenth section, "part of the public domain of the United States," of despoiling their proprietors of all their rights, of administering to them, not the gracious promises of the Treaty, not the well established principles of National Jurisprudence, not even the Law of Civilized Conquest, but without investigation, without trial,

Law, that all mines of gold, silver, quicksilver, lead, and other metals as well as salt-springs, *found in the Royal Seigniory*, belonged to the Crown. As a consequence of this ownership, all persons were prohibited to work them *without Royal grant or license*, unless held from *time immemorial*, when such grant or license would be presumed.

Partida 3, Title 28, Law 11;

Novis. Recop. Lib. 9. Title 18, Law 1;

Translated in Halleck's Mining Laws of Spain and Mexico, pp. 3 and 4.

A *general* Royal license, however, was shortly thereafter, to wit: in the year 1387, granted for each person to work the mines which he might discover within *his own inheritance*, and likewise those which might be found in the inheritances of other persons, *with their permission*.

Recop. de Castilla, Lib. 6, Title 13, Law 3:

Same Law, Novis. Recop. Lib. 9, Title 18, Law 2:

Translated in Halleck's Mining Laws, p. 5.

It appears that, at this early period, and probably later, it was the custom of the Spanish Monarchy to make *grants* of *mines*, either separately, or in conjunction with the jurisdiction and *seigniory* of the *Province*, *Bishopric*, *Partido*, or *Pueblo*, in which they were situated, to persons who had rendered services to the crown, on condition of the grantee thereof paying to him a *certain proportion* of the metals which might be extracted, and that this system of granting was extended likewise to the Indies.

Recop. de las Indias, Lib. 4, Title 3, Law 24:

Translated in Halleck's Mining Laws, p. 129.

A *general Royal license*, also, to work the mines of gold, silver, quicksilver, and other metals, which either Spaniards or Indians might discover in the *Indies*, on giving account thereof

to the Governor, and paying the proportion of the metal extracted which was due to the Crown, was likewise granted as early as the years 1526 and 1551.

Recop. de las Indias, Lib. 4, Title 19, Laws 1 and 14:
Translated in Halleck's Mining Laws, pp. 130, 138, 139.

The Principle thus, at first, established only as to the *Royal Seigniory*, was afterwards, in the reign of Phillip II, by a law promulgated January 10th, 1559, extended to the *whole Kingdom*, by which law he declared "*resumed* and *incorporated* in our Crown and Royal Patrimony, all the mines of gold and silver, and quicksilver of these our kingdoms, in whatsoever parts and places they may be, and are found, whether in Royal lands, or in those of *Lordships* or of *the Clergy*, and whether in public, municipal, or vacant lands, or in *inheritances, places, and soils of individuals*, notwithstanding the grants which by us, and by the Kings our predecessors, have been made to any persons, of whatsoever condition, rank, and dignity they may be, and for whatsoever causes and reasons, as well those *for life*, and *for years*, and *on condition*, as those in perpetuity, and free, and without condition," etc., those grants, "only remaining in force and vigor respecting mines of silver and gold, which, by the persons to whom the said grants were made, or by others in their name and with their consent, have been *begun to be worked*, and *are actually worked* now at the date of this our letter," etc.

Recop. de Castilla, Lib. 6, Title 13, Law 4:
Same law in Novis, Recop. Lib. 9, Title 18, Law 3:
Translated in Halleck's Mining laws, pp. 6–15:
Also translated in Rockwell's Spanish and Mexican Laws, pp. 113–116.

Weighty reasons of public policy, and the public welfare, were assigned in said law for this act of *high sovereignty*, and provisions was likewise therein made for the *recompense* of the noblemen and other persons, to whom the

grants, thereby revoked and annulled, had been given, according to what, upon examination, might appear just.

From this point of time, therefore, the principle became firmly established, that all mines of gold, silver, quicksilver, and other metals, whether found in public lands, or in those of private persons, or corporations, throughout the entire Spanish Monarchy, including the Indies, belonged to the Sovereign,and this principle, as we shall see, is ever after recognized as a fundamental one in Spanish law and legislation.

Spanish Ordinances of August 22d, 1584, in Recop. de Castilla, Lib. 6, Title 13, Law 9, *Art. I.*

Novis. Recop. Lib. 9, Title 18, Law 4:

Translated in Halleck's Mining Laws, pp. 69 and 70:

Spanish Mining Ordinances of May 22d, 1783, Title 5, Art. 1, in Mexican "Ordenanzas de Mineria," p. 68.

Translated in Halleck's Mining Laws, p. 222:

Also translated in Halleck's Mining Laws, p. 222:

Also translated, Rockwell's Spanish and Mexican law, p. 49.

Gamboa's Commentaries, tranalated in Rockw. pp. 126, 127, 139:

Solorzano's Politica Indiana, Lib. 6, Cap. 1, No. 17:

Report of Hon. Thomas Ewing, Secretary of Interior, of Dec. 3d, 1849, published in Rockw., p. 411.

The object of this incorporation of the mines of the Spanish kingdoms into the Royal Patrimony, and of the establishment of the principle of the ownership thereof by the Crown was, as declared by the law itself, as well as shown by those subsequently enacted on the same subject, not that the sovereign should discover and work them himself, or that they should be discovered and worked on his account, but that the privilege and right of discovering, and of acquiring the ownership thereof in small parcels, and of working them, might be extended *to all the subjects of the Crown*, in order that thereby this great and *principal* source of the wealth of those kingdoms might be de-

veloped, instead of being locked up, as theretofore, in the hands of a *few persons*, who neither did, nor would develope it.

Preamble and Article 2d of Law of January 10th, 1559, in Recop. de Castilla, Lib. 6, Title 13, Law 4:

Novis. Recop. Lib. 9, Title 18, Law 3:

Translated in Halleck's Mining Laws, pp. 6–11:

Gamboa's Commentaries, translated in Rockw., p. 127.

In accordance with this intention and object, a full and free *license* and *permission*, subject only to payment of the proportion reserved to the Crown, was, by this same Law, extended to *all Spanish subjects*, to search, dig for, and discover mines, "in all parts whatever of Royal lands, or lands of Lordships, or of the Church, or of any others, as well in public, municipal, and common lands, as in the inheritances and estates of individuals," and, upon such discovery, by the *registry* thereof before a *Royal Notary*, or before the *Court* in the jurisdiction of which such mine might be found, within twenty days after such discovery, and by complying with the other formalities and requirements prescribed in said Law, it was declared that the discoverer should *acquire the exclusive right* thereto, and that "the said *Mine* which he shall have discovered and registered, shall be *one hundred varas long, and fifty varas wide*, as he may select it, so that, within said *limit* and *space*, no other person can interfere to try, dig, or work, and that, within said *space* and *limits*, the said *discoverer alone* shall have such right and power, without that he can be *impeded or prevented by us, or in our name*, or by any other person, as aforesaid," but that such mine should be worked as prescribed in said Law, and as should be declared in the ordinances to be established on the subject, or in default thereof, that it might "be *denounced* before the Judge, and registry made of it, as of a vacant and undiscovered mine," etc.

Arts. 2, 4, 5, and 6 of said last Law.

On the 23d of May, of the same year, 1559, the same rules in regard to the "*staking out of the boundaries* of Mines which they shall discover," was ordered to be observed towards the Indians, in the provinces of the *Indies*, as are "observed with respect to Spaniards, without any difference whatever."

Recop. de las Indias, Lib. 4, Title 19, Law 16:

Translated in Halleck's Mining Laws, p. 140.

The policy thus inaugurated was very shortly thereafter, to wit: on the 18th day of March, A. D. 1563, carried into full operation and effect, by the establishment, in the reign of the same monarch, Phillip II, of the ordinances called by Gamboa the "old ordinances," by which it was enacted, that "all persons whosoever, even though they be *foreigners*, may freely search for mines of gold and silver, and such other as by these our ordinances are declared, and make trial pits, and do all things necessary for the discovery of the said metals, in all our said kingdoms and lordships of the Crown of Castile, outside of the places excepted, in the fields, woods, vacant places, commons (egidos) and pastures, whether belonging to us, to Pueblos, *or to private persons*, and in any inheritances whatsoever, without that, in them, any of the owners, or any persons whosoever, can impose any impediment or prohibition," etc., and that the first discoverer of any such mine, upon the registering the same before the *Court* within whose jurisdiction such mine may be situate, etc., "shall enjoy a *space of one hundred and twenty varas in length upon the vein*, and *sixty in width*, and if he should wish to measure out the said space of one hundred and twenty varas, and sixty varas across the vein, he shall be at liberty to do so," etc., and that "at the stakes of each first discoverer *one mine* be left for us of the same *dimensions* as his own," etc., and that "*each* of the *mines*, taken after the said first discoverer has taken his, and ours has been taken, shall be *one hundred varas long and fifty wide*, which *space* they may take across the vein,

or as to them shall seem best," etc. And that "no person, whether he be the first discoverer or any of the subsequent ones, shall be at liberty to take more than *two mines* on one vein, and these two mines which he may thus take, he shall not be at liberty to take together, but there shall be at least sufficient space of *land* between for *three mines;* except in case he shall have purchased, or shall purchase them, because by purchasing them he may have *two* or *more*, even though they be *many*, and all *lying together*," etc.

Said ordinances likewise contained specific regulations in regard to the mode of establishing the "*boundaries*" of such mine, the time within which the trial-pits must be sunk, and the manner in which they must be worked, and kept occupied, (*pobladas*) or that, in default of the performance of such conditions, they should become *forfeited*, and subject to *denouncement*, and, upon judicial ascertainment of the facts creating such forfeiture, *adjudicated* to the denouncer, and *possession* thereof delivered to him.

Arts. 15, 16, 21, 22, 23, 24, 25, 30, 31, 37, 39, 40, 41, 42, &c., of said ordinances in Recop. de Castilla, Lib. 6, Tit. 13, Law 5:

Translated in Halleck's Mining Laws, p. 21—39.

Said ordinances of March 18th, 1563, continued in full force until the 22d day of August, A. D. 1584, when the ordinances of the latter date, called by Gamboa, the "New Ordinances," were enacted. These, after by Article 1st, revoking and annulling all laws, edicts, privileges, and customs, then existing, so far as in *opposition* thereto, but expressly "*leaving in force and effect* the 4th Law of this Title, so far as it treats of the incorporation in our Royal Patrimony of the mines of gold, silver, and quicksilver of these our Kingdoms, of which gift (*merced*) had been made to private persons, by Districts, (*Partidos*) Bishopries, and Provinces," proceeds as follows:

Art. 2. And in order to benefit and favor our subjects and natives, and all other persons whatsoever, even though foreigners to these our kingdoms, who may work or discover any mines of silver, already discovered or to be discovered, we will and command that *they shall have them*, and that they shall be *their property* in *possession* and *ownership* (*propriedad*,) and that they may do with them *as with anything their own*, observing, as well in regard to what they have to *pay by way of duty to us*, as in all else, what is prescribed and ordered in this edict;" etc.

And after prescribing the *proportion* of the metal to be in each case so paid, varying according to the richness of the mine, said ordinances continue:

"Art. 16. Also we ordain and command that all persons whosoever, even though they be foreigners, may freely search for mines of gold, and silver, and such other as by these our ordinances are declared, and make trial-pits, and do all things necessary for the discovery of the said metals, in all our said kingdoms and lordships (*Senorios*) of the Crown of Castile, (outside of the places excepted,) in the fields, woods, vacant places, and outside lands (*egidos*,) and pastures, (*dehases*,) *whether belonging to us, to pueblos, or to private persons*, and in *any inheritances whatsoever*, without that any owners of such pasture grounds and inheritances, or any person whosoever can impose any impediment or prohibition to their so doing," etc.

And after prescribing the formalities to be observed in the *registry* of Mines before said *Court of Mines* (*Justicia de Minas*,) within whose jurisdiction they shall be discovered, and what such registry must contain, and the other acts to be done by such discoverer, said ordinances continue as follows:

"Art. 22. Also, we ordain and command, that the person who shall first find and discover a mine, shall, as first finder and discov

erer, make the first registry, and enjoy *all the spaces of ground belonging to mines* (*pertenencias de minas*) *which he shall stake out, or be pleased to stake out, at the mines and veins which he may discover, or may have discovered*, provided that he shall within ten natural days from the time of his making registry of such mine, *stake out, declare, and mark the mining spaces* (*pertenencias*) *which he may desire*, and that he shall enjoy the *measurement* (*medida*) *which to each portion staked out properly pertains throughout all the mining spaces* (*pertenencias*) staked out, which he shall designate as discoverer," etc.

"And that the others who come after him, shall proceed in their order to *stake out*, and alter their *boundaries*, as they, from time to time, discover ore; and that when they shall have made registry, as they are obliged to do, they shall proceed to set up a fixed stake in all the mining spaces (*pertenencias*) *which they may desire to take, and to mark out*, within the said term of ten days, after the expiration of the first ten days which are allowed to the first discoverer; for those who *stake out a mine* shall always have ten days to view the mine, and to take on it all the *mining spaces* (*pertenencias*) which they desire, and to set up a fixed stake which they cannot leave, nor enter into the *mining spaces* (*pertenencias*) which shall have been staked out before, because all the mining spaces (*pertenencias*) and *boundaries* which have been *taken* and *marked out*, are *always to be preserved* to those who first *staked them out*," etc.

"Art. 23. Also, we ordain and command, that any person who shall have discovered, or shall discover, a new mine, and shall have made registry, as directed in the preceding ordinance, shall enjoy *a space of one hundred and sixty varas in length upon the vein, and eighty in width;* and, if he shall wish to measure out *the said space of one hundred and sixty varas and eighty varas* across the vein, he

shall be at liberty to do so, and may do it in such manner as to him may appear expedient," etc.

"And those who, after the first discoverer, shall have taken mines, or shall hereafter take them, may proceed to take and work their Mines, and *mining spaces* (*pertenencias;*) and *each of the mines* taken, after the said discoverer has taken his, ***shall be one hundred and twenty varas long and sixty wide,*** which *space* may be taken across the vein, or as it shall seem best, provided it does not leave the fixed stake, and is without prejudice to a third party."

And, after minute provisions as to the proceedings to be taken before the *Court of Mines*, for the purpose of compelling the fixing of the ***boundaries*** of the mines of such first discoverer, and others having rights prior and paramount to those of the applicant, said ordinances continue as follows:

"Art. 26. Also, we ordain and command, that when, and as often as, application shall be made, to set out ***boundary stakes***, and they shall be set out as aforesaid, care shall be taken in setting out the stakes, to make ***an oblong with right angles;*** and that in said oblong, and not outside of it, the said fixed stake shall be left; each one ***taking the number of varas which he is entitled to***, wherever he may wish, or deem best, in the form before set forth and declared."

Again:

"Art. 31. Also, we ordain and command, that the first finder and discoverer of such mines, may take all the ***stakes*** and ***mining spaces*** (***pertenencias***) which he wishes, observing in respect to the same, what is contained in these ordinances, on that subject; and that he may also ***hold and possess as many mines and mining spaces*** (***pertenencias***) as he shall ***purchase*** or ***inherit***, or as shall ***belong to him*** by any ***title*** or cause whatsoever."

And, after minute provisions as to the time within which, and depth to which, the trial pit must be sunk, in ***each*** of such mines, the 37th Article declares, "that all persons shall be obliged to have

their mines occupied (*pobladas*) by at least four persons to *each mine, or mining space*, (*pertenencia,*)" under penalty that, "if any mine whatsoever shall not be occupied and worked by said four persons, as aforesaid, for four consecutive months, it shall be thereby (*porael mismo caso,*) *forfeited*, and the person who *owned it* shall *forfeit it*, and in future, shall have *no right* to it, unless by *registering it anew*, and by going through the other proceedings conformably to these ordinances; and said mine shall be *adjudged* to any person who shall *denounce* it as unoccupied, provided he go through the proceedings aforesaid," etc.

The *judicial* proceedings to be had before the *Court of Mines* upon such *denouncement*, until the final *judgment* of said Court thereon, and *delivery of possession*, in case the forfeiture were established, are likewise minutely prescribed, from which judgment the party deeming himself aggrieved might prosecute *an appeal*, though without staying the *delivery of possession* to the denouncer, in case of the establishment of such forfeiture.

By the 69th, 70th, and 71st Articles of said ordinances these provisions in regard to the taking, registering, and *staking out the boundaries* of mines of silver, and keeping them occupied and worked, are extended to mines of gold, with the only difference that the first discoverers of the latter metal, "shall take and have a *space of eighty varas in length, and forty in width*," and "those who come after them shall take and have a *space of seventy varas long, and thirty wide*."

See Arts. 1, 2, 3, 4, 5, 6, 7, 16, 17, 22, 23, 26, 31, 35, 37, 38, 39, 69, 70, 71, of said ordinances in Recop. de Castilla, Lib. 6, Tit. 13, Law 9:

Novis. Recop. Lib. 9, Tit. 18, Law 4:

Translated in Halleck's Mining Laws, p. 68—123.

By a Law of Phillip III, dated November 26th, A. D. 1602, the Viceroys of the Indies were ordered to cause the laws of the King-

doms of Castile, *respecting matters of mines*, to be observed, enforced, and executed in those Kingdoms, so far as found suitable, and not opposed to what had been specially provided for each Province, and to send an account of what laws of mines are not enforced in each Province, and why, &c.

Recop. de las Indias, Lib. 2, Tit. 1, Law 3:
Translated in Halleck's Mining Laws, p. 128.

And by two subsequent Laws of Phillip IV, one dated June 18th, A. D. 1629, and the other, June 7th, A. D. 1630, reciting that "the decline of some *Asientos* of mines results from the non-observance of our Royal Ordinances, especially those with respect to deserted and abandoned mines," &c., it was, by said first mentioned law. commanded that "the Viceroys, and Presidents, and *Oidores* of our *Audiencias, strictly and punctually observe and complg with the said ordinances*," &c., and by the last mentioned Law, that the Ordinances and particular Laws which treat of mines, shall be observed, complied with, and carried into effect, &c.

See said Laws in Recop. de las Indias, Lib. 4, Tit. 19, Laws 5 and 6:
Translated in Halleck's Mining Laws, p. 133, 134.

Said Mining Laws and Ordinances were, likewise, by a law of the same Monarch, dated April 16th, A. D. 1635, extended to the Philippine Islands.

Recop. de las Indias, Lib. 4, Tit. 20, Law 6:
Translated in Halleck's Mining Laws, p, 144.

A Government monopoly of the trade in quicksilver, and of its supply for the use of the mines of the Indies, appears to have been established as early as the year 1559, by a Law of that date, re-enacted at various times, down to February 28th, 1637.

Recop. de las Indias, Lib. 8, Tit. 23, Law 1:
Translated in Halleck's Mining Laws, p. 167, 168.

Notwithstanding this monopoly, however, the discovery and working of *Mines* of this metal in the Indies, was authorized by a Law of June 19th, 1568, and by a subsequent one of January 19, 1609, directed to be *especially encouraged*.

Recop. de las Indias, Lib. 4, Tit. 19, Laws 1 and 4:
Translated in Halleck's Mining Laws, p. 130, 132.

Subsequently, such Mines having been discovered in the jurisdiction of the Villa of Guernavaca, in New Spain, and their working commenced, through fear of injury therefrom to said Royal Monopoly, an Order was issued, dated July 5th, 1718, commanding that said Mines be *closed up*, and their working *prevented*.

Gamboa's Commentaries, Chapter 2, § 40:
Translated in Halleck's Mining Laws, p. 177, 178:
Rockwell, p. 140.

Gamboa also relates two other instances, one occurring in the year 1730, in regard to Quicksilver Mines, discovered in the jurisdiction of the Sierra de Pinos, in the district of Guadalaxara, and the other in the year 1745, in regard to such Mines discovered in the Cerro del Carro, in the same district.

Gamboa's Com., Cap. 2, § 41, 42:
Translated in Rockwell, p. 140, 141.

These Mining Ordinances of 1584, with very slight modifications continued in force, not only in Spain itself, but likewise in the kingdom of New Spain, (which included California,) down to the year 1783, and it was upon them, together with those of the previous Mining Codes which were considered as not having been repealed by them, that the eminent law writer, Francisco Javier Gamboa, in the year 1761, published his Commentaries.

Gamboa translated in Rockwell, p. 119, 120:
Recop. de las Indias, Lib. 2, Tit. 1, Law 2:
Translated in Rockwell, p. 393.

Upon the recommendation of the Viceroy of New Spain, communicated in a letter dated December 24th, 1771, the King, by *Cedula* of July 20th, 1773, ordered him to cause to be framed, by persons skilful and experienced in mining, a new Mining Code, for the special government of the Miners of New Spain, and by subsequent Royal Orders, directed that said Miners should form themselves into a Guild, (*Gremio*) or Corporation, (*Cuerpo*) similar to the *Consulados* of Commerce; which orders having been carried into effect on the 4th day of May, A. D. 1777, by the assembled Deputies of said Miners, and the persons who should compose their Royal Tribunal of Mining having been elected, the whole was approved by the Viceroy, by Decree of June 21st of the same year, and thereafter communicated to the Sovereign, who, by Royal Order of December 29th of the same year, confirmed the same. To this Tribunal General of Mining was committed the task of framing said new code of Mining Ordinances. These Ordinances were completed by said Tribunal and transmitted to the Viceroy, on the 21st of May, A. D. 1778, and by the latter to the King on the 26th of August, A. D. 1779, who, on the 22d day of May, A. D. 1783, by Royal *Cedula*, approved them, ordering that all their contents should be regarded as "*Law* and *Statute*, positive and perpetual," and "inviolably observed, notwithstanding any other Laws, Ordinances, Establishments, Customs, or Practices to the contrary," which, so far as existing, were thereby expressly revoked, and declared to be without effect.

Introduction to Mexican *Ordenanzas de Mineria*, pp. 7—11. Also Art. 13 of Title 19 of said Ordenanzas:

Translated in Halleck' Mining Laws, pp. 189—192, 307.

Said Ordinances were received in Mexico, and by Decree and Proclamation of the Viceroy, Matias de Galvez, published, and ordered to be observed throughout New Spain, on the 15th day of January, A. D. 1784.

See note to Art. 13 of Title 19 of Mexican "*Ordenanzas de Mineria*:"

Translated in Halleck's Mining Laws, pp. 311–315.

These Ordinances provided for the government, functions, and renewal, of said "Royal Tribunal General of Mining," for the establishment of special Mining Tribunals, called "Deputations of Mining," composed of two "Deputies" elected by the Miners of each "*Real*" or "*Asiento*" of Mines, to whom was committed the exclusive jurisdiction in first instance of all matters relating to Mines and Miners throughout their respective Districts, prescribed the mode of administering justice in said Tribunals, and created a "Bank of supplies for Miners," and a "Royal Seminary of Mining."

Titles 1, 2, 3, 4, 16 and 18 of said Ordinances in Mexican "*Ordenanzas de Mineria*;" Translated in Halleck's Mining Laws, p. 193–222, 283–289, und 295–301.

The 5th Title of said Ordinances is as follows:

"Title V.

Of the *fundamental ownership* (*dominio radical*) of Mines; of their *concession* to individuals; and of the duties which for this are to be paid.

ART. 1. Mines are the *property of my Royal Crown*, as well by their nature and origin, as by their *re-union*, declared in Law 4, Title 13, Book 6 of the Nueva Recopilacion.

ART. 2. Without separating them from my Royal Patrimony, I *grant them* to my subjects *in property* (*en propriedad*) and possession, in such manner that they may *sell* them, *exchange* them, *rent* them, *donate* them, pass them *by will*, either in the way of *inheritance*, or legacy, or *in any other manner alienate* the *right which*

in the mines belongs to them, on the same terms on which they themselves possess it, and to persons capable of acquiring it.

"Art. 3. Let this grant be understood to be upon *two conditions: First*, that they shall contribute to my Royal Treasury the *prescribed portion* of Metals; and *Second*, that they shall work and enjoy the Mines, *complying with what is prescribed in these Ordinances*, so that they shall be considered *forfeited* (*perdidas*) whenever a failure shall occur in complying with those (Ordinances) in which it is so provided, and that they may be granted to any person who, for that cause, may denounce them."

Art. 1st of Title 7th (relating to the same subject,) is as follows:

"Art. 1. To all the subjects of my dominions of Spain and the Indies, of whatever rank or condition they may be, I *grant* the Mines of *all kinds of metals* with the *conditions* already stated, and which shall be expressed hereafter; but I prohibit foreigners from acquiring or working Mines as their own property, (*propias*) in my said Dominions, unless they be naturalized, or tolerated therein, by my express Royal license."

Article 14th of Title 6th of said Ordinances is as follows:

"Art. 14th. Any one may discover and denounce a vein or Mine, not only in *common lands* (*terminos communes*) but also in the *private lands of any individual*, provided he pays for the land which he occupies on the surface, (*que ocupare en la superficie,*) and the damage which immediately ensues therefrom, according to the valuation of the Experts appointed by both parties, and a third in case of disagreement; the same being understood with respect to him who denounces a place, (*sitio*) or waters for establishing works, and moving the machines, necessary for the

reduction of ores, which are called *Haciendas*, provided they do not include more land, nor use more water, than may be necessary."

The *heading* of said 6th Title is as follows:

Title VI.

Of the *modes of acquiring* Mines; of new discoveries, *registries* of veins and *denouncements* of Mines abandoned or forfeited."

Said Title then continues, as follows:

"Art. 1. As it is very just and proper to reward with *particularity* and distinction those who dedicate themselves to the discovery of new mineral places (*minerales*) and metalic veins which exist in them in proportion to the merit, importance, and utility of such discovery, I order and command that the discoverers of one or more mineral hills (*cerros*) absolutely new, in which there is no Mine, nor trial-pit open, may acquire the principal vein which they may select, as much as *three pertenencias*, continuous or interrupted, according to the measurements which hereinafter shall be prescribed; and that if they may have discovered more veins, they may have *one pertenencia* in each vein, said *pertenencias* being determined and *marked out* within the term of ten days."

"Art. 2. The discoverer of a new vein in a hill known and worked in other parts, may have in it *two pertenencias*, continuous or separated by other Mines, provided that he specifies them also within ten days, as is mentioned in the preceding Article."

"Art. 4. Those mentioned in the preceding Articles, must appear with a written statement before the *Deputation of Mining* of that district (*territorio*) or the one nearest, if there should be none there, stating in it their names, and those of their partners, (*companeros*)

if they have any, the place of their birth, their residence, profession, and employment, and the most particular and distinguishing features of the place, (*sitio,*) hill, (*cerro,*) or vein, of which they ask *the grant* (*adjudicacion;*) all of which circumstances, and the hour in which the discoverer presents himself, shall be noted in a *Book of Registry* which the *Deputation*, and Notary of Mines, if there be one, shall keep, and this being done, his written statement shall be returned to the discoverer for *his due security*, and notices (*carles*) shall be affixed to the doors of the Church, Government houses (*Casas Reales,*) and other public places of the Town, for due information. And I order that within ninety days, he shall have made in the vein or veins of his registry, *pit* (*pozo*) of a vara and a half wide, or in diameter, at the mouth, and ten varas down or in depth, and that as soon as this is done, one of the Deputies shall personally go, accompanied by the Notary, if there be one, and if there be none, by two assisting witnesses, and a professional Mining Expert, (*Perito facultativo de Mineria,*) of that district, to inspect the course and direction of the vein, its width, its inclination to the horizon, what is called *echado*, or *recuesto*, its hardness or softness, the greater or less firmness of its sides, and the species or principal indications of the *mineral*, taking an exact account of all this, in order that it may be added to the corresponding part of its registry, with the evidence (*fe*) of possession, which shall immediately be given in my Royal name, measuring to him his *pertenencias*, and causing him to fix stakes in his *boundaries*, as will hereafter be mentioned; which being done, there will be delivered to him an *attested copy of the proceedings* as a *corresponding Title.*"

"Art. 5. If during the said ninety days, any one shall appear pretending to have a right to said discovery, he shall have a brief hearing in court (en justicia,) and it shall be *adjudicated* to the one who best proves his claim; but if he appear after that time, he shall not be heard."

"Art. 6. The restorers of old mining places (*minerales*) which are decayed and abaudoned, shall have the same privilege as discoverers, selecting and enjoying *three pertenencias* in the principal vein, and *one* in each of the others; and both shall be *especially rewarded*, and receive the preference in parity of circumstances, and whenever there may be an opportunity."

"Art. 17. I prohibit any one who is not the discoverer from denouncing two contiguous Mines on the same vein, but I permit any person to *acquire* and possess, one by denouncement, and another or more by purchase, gift, inheritance, or othor *just title* whatsoever. And I further declare that if any person shall undertake the working [*pretendiere la habilitacion*] of *many mines*, inundated or ruinous, [*inundadas o ruinosas*,] or any other considerable undertaking [*empresa*] of this kind, and for this purpose *desires that there be granted* to him by deuouncemeut *many mining spaces* [*pertenencias*,] even though they be contiguous and on the same vein, he must apply and represent the case to tho Royal Tribunal General of Mexico, in order that the merit and circumstances of the undertaking [*empresa*] being proved, it may report upon the matter to the Viceroy, who, finding therein nothing prejudicial to the Body of Mining, to the Public, or to my Royal Treasury, but rather advantageous, will *grant* to him *this* and *other privileges*, exemptions and assistance which may be given, provided that my Royal approval be previously obtained for such gifts [*gracias*] as do not come within the ordinary authority of the Viceroy."

Article 17th of Title 10th, and Article 1st of Title 11th, both upon the same subject of special *favors* and *assistance* to be rendered to important and beneficial undertakings in Mining, are as follows:

"Art. 17. To all persons who shall undertake to defray the expense of draining and clearing *many mines*, by constructing general

shafts, [*Tiros*,] or other works, and causing to be constructed and maintaining costly machines, because adits are not practicable, I grant the ownership of all the deserted mines and *pertenencias* which they shall effectually clear, even though they be contiguous upon the same vein, and I command that the Viceroy, on the recommendation of the Royal Tribunal General of Mexico, shall *grant* to them all the *privileges*, exemptions, and *assistance* which can be dispensed," etc.

"Art. 1. Inasmuch as many mines are worked by several miners united, their partnership beginning from the time they denounce them, or being subsequently entered into in various ways, and as this is of great advantage and utility in working mines, since it is more easy to engage therein where many unite together, each contributing his part of the capital, or because where the capital of one alone is not sufficient for great undertakings, [*empresas*,] that of all the partners may be ample; I will and command that such special or general partnerships be encouraged, promoted, and protected by all convenient measures, my Viceroy *granting* to those who may form them, all the *favors* [*gracias*,] *assistance*, and exemptions which can be granted to them, according to the judgment and discretion of the Royal Tribunal of Mining, and without detriment to the interests of the public, and of my Royal Treasury."

Articles 18th and 22d, of aforesaid Title 6th, are as follows:

"Art. 18. *Placeres*, and any kind of deposits [*criaderos*] of gold and silver, shall be subject to *discovery*, *registry*, and *denouncement*, in the same form as mines in veins, the same being understood of *all kinds of metal*."

"Art. 22. I also grant that any one may *discover*, *petition for*, *register*, and *denounce*, in the prescribed form, not only Mines of gold and silver, but also those of precious stones, copper, lead, tin,

quicksilver, antimony, zinc, bismuth, rock-salt, and other fossils, whether perfect metals, or half-minerals, bitumen, or mineral tar, *they being given to him* for his enjoyment, benefit, and working, according to the particular circumstances of the cases. But I declare that although the free discovery and denouncement of *Mines of quicksilver* is permitted, it must be on the express condition of giving an account of them to the Viceroy, and to the superintendant sub-delegate of quicksilver in Mexico, in order that it may be considered and determined whether such Mine or Mines shall be worked and carried on *at the expense of the particular subject* who discovered and denounced them, he punctually delivering the quicksilver extracted from them into the Royal Storehouses on the terms and prices stipulated, or whether it shall be done *at the expense of my Royal Treasury*, indemnifying the party for it by some equitable reward, according to the circumstances of the said discovery and denouncement, the whole of this important subject being regulated according to my sovereign intentions recently declared on that subject."

Articles 8th, 9th, 10th and 11th of the same Title, specifically point out the necessary steps and proceedings to be taken in the *denouncement* of a mine as deserted and abandoned, [*despoblada*] or forfeited for any other reason, in its *registry* in the *Book of Denouncements* to be kept by said *Deputation of Mining*, under what circumstances the former owner shall be heard in court [*en justicia*] as to the *possession*, and when only as to the *right of property* [*propriedad*,] of such Mine, and where the forfeiture is established, and the other acts required of the denouncer, in the *adjudication* and *delivery of possession* of such Mine to such denouncer.

The *dimensions* of *Mines* are specified in the 8th Title of said Ordinances, as follows:

"Title VIII.

Of *pertenencias* and intermediate *spaces*, and of the *dimensions* which in future *Mines* are to have."

"Art. 1. Experience having proved that the equality of the dimensions of Mines established on the surface, cannot be observed under ground [*en la profundidad,*] where they are really of value, it being certain that the greater or less inclination of the vein to the plane of the horizon, makes the *pertenencias* of the mines larger or smaller, so that there does not result that true and effective equality, which it has been desired to establish between subjects of equal merit, as it may well happen that when a Miner, after much expense and labor, reaches the boundaries where the metal begins to be abundant and rich, another person compels him to turn back, as being already at the boundaries of his *pertenencia*, because of his having denounced the next Mine, and having placed himself at that point with more cunning than labor; so that from this arises one of the greatest and most frequent causes of litigation and dissension among the miners: Wherefore, and considering also that the limits established in the Mines of these kingdoms, and by which those of New Spain have, until now, been regulated, are very confined in proportion to the multitude, abundance, and richness of the metalic veins which of His great bounty, the Creator has been pleased to bestow upon those Regions, I order and command, that in Mines which shall hereafter be discovered in a new vein, or without neighbors, [*sin vecinos,*] the following dimensions shall be observed."

"Art. 2. On the thread, direction, or course of the vein, whether of gold, silver, or any other metal, I *grant* to every Miner, without without distinction as to dicoverers, (who already have their reward specified,) two hundred Castilian *varas*, which are called *de medir*, (long or running measure,) taken on a level, and as has hitherto been understood."

"Art. 3. To make what is called a square, (*quadra*,) that is, to make a rectangle with the proceeding measurement, supposing the dip or inclination (*echado o recuesto*) of the vein to be sufficiently shown in the pit of ten *varas*, the *pertenencia* will be measured by the following rule:

"Art. 4. The vein being perpendicular to the horizon, [which rarely happens,] one hundred varas shall be measured on a level, either side of the vein, or divided on both sides, as the Miner may desire them."

"Art. 5. But the vein being inclined, which is usual, attention shall be given to its greater or less dip, in the following manner:"

"Art. 6. If to one *vara* in depth the inclination be from three fingers [*dedos*] to two hands, [*palmos*,] the square given shall be of the same, one hundred varas."

"Art. 7. But if to the said one *vara* in depth there be an inclination of

2	hands	and	3	fingers,	the	square	(*quadra*)	shall be	112½ varas
2	"		6	"	"	"	"	125	"
2	"		9	"	"	"	"	137½	"
3	"		0	"	"	"	"	150	"
3	"		3	"	"	"	"	162½	"
3	"		6	"	"	"	"	175	"
3	"		9	"	"	"	"	187½	"
4	"		0	"	"	"	"	200	"

So that, if to one vara in depth there be an inclination of four hands, which is one vara, there shall be granted to the miner two hundred varas square, [*por la quadra*,] and on the dip of the vein; and so on with the remainder."

"Art. 8. And considering that, in the manner prescribed, any miner may reach the perpendicular depth of

two hundred varas without exceeding the limits of his *pertenencia*, by which time, usually, he will have considerably exhausted the vein; and considering that those which have a greater inclination than that of vara for vara, that is, forty-five degrees, are either barren or of little duration, it is my Sovereign will that, although the dip or inclination of the vein may be greater than the dimensions indicated before, the square (*quadra*) shall never exceed two hundred varas on the level, and that these dimensions shall always be the width of the said beds or lodes (*Mantas ó vetas*,) along the whole length of the other two hundred varas which have been determined above."

"Art. 9. But if any miner, suspecting any other vein of a contrary inclination or variation, from his own, (which rarely occurs,) shall desire to have given to him any part of his square in a direction opposite to the inclination of the principal vein which he has denounced, it may be granted to him, provided that no fraud be shown, or prejudice result to a third person, and not otherwise."

"Art. 10. In the *placeres*, pockets, (*rebosaderos.*) or other irregular deposits (*criaderos*) of silver and gold, I order that the *pertenencias* and measurements shall be regulated by the respective territorial Deputations of Mining, attention being given to the extent and richness of the place, (*sitios*,) and to the number of applicant, preferring and distinguishing only the discoverers; but with the obligation that said Deputations give an exact account thereof to the Royal Tribunal General of Mexico, in order that it may determine thereupon, as it may think and deem most efficacious for avoiding all collusion."

"Art. 11. The *pertenencias* being regulated in the manner prescribed, there shall be measured to the denouncer his *pertenencia* at the time of taking possession of the mine,

he being required to set up in his boundaries, stakes, (*estacas.*) or land-marks, (*mojones,*) secure and easily distinguished, with the obligation of having them kept and preserved perpetually, without the power to change them, even though he allege that his vein has varied in course or inclination, (which are unusual things,) but he must be content with the lot which Providence has assigned to him, enjoying it without disturbing his neighbors; if, however, he shall have no neighbors, or if he can, without injury to them, improve the location of his stakes, (*mejora de estacas,*) or change his boundaries, he may be permitted to do so for such causes, with the previous intervention, knowledge, and authority of the deputation of the District, which shall summon and hear the parties, as to whether they may be and are legitimate."

"Art. 17. The miner shall be the *owner*, not only of the *space* of the particular vein which he denounced, but also of all those which, in any form, figure, or situation, are found *within his pertenencia*; so that, if a vein begins (*sacare la cabesa*) in one *pertenencia*, and passing on, terminates (*llevare la cola*) in *another*, each owner shall enjoy the portion which passes through his *respective boundaries*, and neither the first, nor any other, on account of having discovered it in *his boundaries*, or of its beginning there, can claim it in its whole extent, or wherever it may happen to be."

Certain *incorporeal* rights and *easements*, such as those of *water, pasturage, watering of animals, ways, cutting of timber for machinery, wood and charcoal, hunting* and *fishing*, are likewise given to all miners by the 1st, 3d, 4th and 12th Articles of the 13th Title, and by the 9th Article of the 19th Title of said Ordinances.

See Titles and Articles of said Ordinances above referred to, in Mexican "*Ordenanzas de Mineria,*" translated in Halleck's Mining Laws, pp. 189–308.

Also, in Rockw., pp. 25–111.

These Ordinances of 1783, from which we have made the foregoing extracts, continued in force, without any important modification, throughout *New Spain*, down to the time of the captivity of Ferdinand VII., and the organic changes which were made in the Spanish policy and government by the *General Cortes*, assembled between the years 1811 and 1814.

One of the first acts of said *Cortes* was, by Decree dated January 26th, 1811, to abolish the *Monopoly of quicksilver*, reserved to the Crown, as we have seen, by Law 1, Tit. 23, Lib. 8 of the *Recopilacion de las Indias*, and, likewise, to abolish the right, reserved by Article 22d, Title 6th of said Ordinances of 1783, of taking *mines* of that metal from the *discoverer* on recompensing him for his discovery, and working them on account of the *Royal Treasury;* which, in the language of said Decree, "leaving *uncertain* the *interest* of the *owner*, (*la suerte del dueno,*) and taking it out of trade, necessarily restrain people from engaging in the *useful and expensive undertaking of discovering and working Mines of Quicksilver.*"

This abolition was likewise made, as said Decree further declares, in consideration of "what was proposed and presented to the same Cortes by the Council of Regency on the 26th of December last, in favor of the liberty and free trade (*franquicia*) of so *necessary an aid* to the operations of mines of gold and silver, and also what on that subject has been asked and solicited of the Cortes by the Deputies of the Indies, urging with learning and zeal the advantage of annulling said dispositions, and any others which wholly, or in part, conform to them, or *oppose* free trade in said mineral and the *security of absolute and perpetual ownership* (*del dominio y perpetuo,*) *of the Miner*, provided that in managing and working them, he observe the general rules established on the subject."

This Decree was, immediately after its passage, communicated to the Viceroy, and to the Royal Tribunal General of Mining of New Spain. In the communication inclosing the same to the latter Body, they are addressed by the Secretary of said Regency, under its authority, as follows:

"Under this date I notify the Viceroy of that Kingdom, that the prerogative of *Seigniory*, which, from remote times the Royal Treasury (*Fisco*) has reserved to itself with respect to *Mines of Quicksilver*, when it consider them advantageous, after having paid to *their owners* their just value, has been annulled by the General and Extraordinary Cortes, in consequence of the resolution and manifestation of the Council of Regency, enacting, at the same time, that the said mines shall be worked under the *same rules and ordinances* as those of gold, silver, and other metals, and that their possessors shall *preserve* their *ownership* and *usufruct*, (*propriedad y usufructo*,) and that in no case shall they be *obliged* (*pueda obligarseles*) to *transfer them* (*enagenarlas*) *to the State;* giving them permission, moreover, to sell their products (*sus frutos*) to any one who will pay the highest price for them. This measure *affirms*, in a manner *inviolable*, the *ownership* (*propriedad*) and profits (*utilidad*) of this *class of real estate*, (*de tales fincas*,) and dispels the reasonable fears which prevented individuals from taking them under their care."

"The zeal of Your Honorable Body, and your love of the public welfare, must cause you to take interest in promoting among those miners, the search for, and examination of mines of Cinnabar, to which there can be no more powerful stimulant than the *offer of a large pecuniary reward*, to be paid from the funds of that Body, to the *person who shall discover*, and fully prove that he has discovered *a rich and abundant mine of quicksilver;* promising, also, that the Council of Regency will *recompense and ennoble*, by *honora-*

ble distinctions, those individuals who shall invest their capital with evident advantage to the said works, and especially, those who shall excel in them by extraordinary progress. To serve as an example to all of the necessity of application to this kind of industry, it will be of advantage for *Your Honorable Body* to undertake methodically *the working of a mine of quicksilver*, which, of all those of that kingdom offers the best prospect, after careful and repeated examination, and exact and well verified reports," etc.

"Finally, the Council of Regency, *by whose order* I communicate to Your Honorable Body these dispositions, expects that you will *use the most efficacious means and measures*, in a matter of *such great importance*, and that you will direct the same with that prudence, wisdom, and knowledge, of which Your Honorable Body and all your subalterns have given so many proofs," etc.

See said Decree, in Galvan's "*Collections de los Decretos y Ordens de las Cortes de España, que se hallan actualmente vigentes en la Republica de los Estados Unidos Mexicanos.*" (Collection of the Decrees and Orders of the Cortes of Spain, which are *actually in force* in the Republic of the United Mexican States, pp. 1, 2.)

Also, said Decree and Communication accompanying the same, in Mexican "*Ordenanzas de Mineria*," pp. 79, 82. Translated in Halleck's Mining Laws, pp. 381–385.

On the 1st day of February, 1811, said *Cortes* passed an Order, offering a *reward* to the discoverers of *Mines of Quicksilver in America*, with other measures for the encouragement (*fomento*) of this business, (*ramo*) which is as follows :

"The General and extraordinary Cortes, desiring *to encourage* (*fomentar*) the discovery and working of *Mines of Quicksilver*, with the attention and particularity corresponding to *their great importance*, have been pleased to provide for rewarding the discoverers in America of Mines of Quicksilver, and for giving *the greatest reward* to whomsoever shall discover the *richest and most productive Mine;* they have likewise resolved that the *Tribunals of Mining* in the Americas be *charged with the exact observance* of this *most important determination*, (*importantisima determinacion*,) stimulating its progress by *all the means deemed conducive to that object*, reporting with punctuality to the Cortes, through the Council of Regency," etc.

This Order was likewise communicated to said Royal Tribunal of Mining of New Spain, under date of February 2d, 1811, in order, as expressed in the communication of said Secretary, "that, with the *greatest efficacy and punctuality*, you will provide for carrying into effect this Sovereign determination, giving me an exact account of what is done, and of the progress made in this matter."

See said Order in Galvan's "*Decretos y Ordenes*," p. 2.

Also, said order and communication in Mexican "*Ordenanzas de Mineria*," p. 83.

Translated in Halleck's Mining Laws, p. 386, 387.

Ferdinand VII having obtained his liberty and returned to Spain, on the 4th day of May, 1814, *annulled* the "Decrees," as well as the "Constitution," which said General and Extraordinary Cortes had enacted and put in force during his absence.

See his "Manifesto" containing this Act, translated in Rockw., pp. 398–404.

He, however, soon after, in consequence of the great dissatisfaction and revolutionary spirit which had arisen throughout his American dominions, was constrained to give way so far to the wishes of his subjects, as to *re-establish* said "Constitution," which he accordingly swore to on the 9th day of March, A. D. 1820.

See Galvan's "Decretos del Rey Don Ferdinando VII," p. 284.

By Decree of April 15th, 1820, he likewise declared the "*Decrees*," of said General and Extraordinary Cortes in full force *throughout America*.

See Galvan's "Decretos de Fernando VII," p. 292.

By the 15th Article of the "Plan of Iguala," adopted February 24th, 1821, for the independence of Mexico, it was declared that "all the political, ecclesiastical, *civil*, and military *employees* should *remain in the same state* in which they were *on that day*," and only such should be removed as manifested their not acceeding to said plan; and by the 12th Article of the "Treaty of Cordova," entered into by the Chiefs of the contending forces of Spain and Mexico, on the 24th day of August, A. D. 1821, by which that independence was recognized, it was further provided that, "The *Provisional Junta* being installed, shall govern *ad interim, in accordance with* the *existing laws*, (*conforme á las leyes vigentes*,) in everything which is not opposed to the Plan of Iguala, and *until* the Cortes form the Constitution of the State."

By the 14th Article of said "Treaty," *provisional legislative power* was given to said Junta, in the cases therein specified, until the assembling of the Cortes.

On the 28th day of September of the same year, the "Act of Independence of the Mexican Empire" was signed and proclaimed by said *Junta* in the City of Mexico, and, on the 5th day of October following, a Decree was passed by said *Junta, ratifying and confirming to all the authorities the attributes which they then possessed*, and in accordance with the Plan of Iguala, and Treaty of the Town of Cordova, for the *legalization of the exercise of their respective functions.*"

See Galvan's "Decretos y Ordenes" Tomo 1, pp. 3–10.

On the assembling of the *First Constituent Mexican Congress*, on the 24th day of February, 1822, they, by Decree of that date, declared the *legislative power* of the Nation vested in themselves, the executive power vested provisionally in the persons then composing the Regency, and the *Judicial power*, in the *Tribunals then actually existing*, or which should be *thereafter created*, all remaining responsible to the Nation for the time of their administration, in accordance with *the laws.*

By another Decree passed on the 26th day of the same month, said Congress *confirmed*, for the present, "*all the Tribunals and Justices* [*Justicias*] *established in the Empire*, in order that they may continue administering justice *according to the existing laws*" [*leyes vigentes;*] and, in like manner, confirmed "*all the authorities*, as well civil as military, of whatever class they may be."

See Galvan's "Decretos y Ordenes," Tomo. 2, pp. 1 & 3.

On the 7th day of October, 1823, said Congress passed a Decree, *suspending* certain Laws of the "Recopilaciones" of Castile, and of the Indies, relating to the disabilities of

foreigners to contract, &c., and suspending, likewise, Article 1, Title 7th of the *Ordinances of Mining* [*las Ordenanzas de Mineria,*] which required them to be naturalized, or tolerated by express license of the Government, in order to *acquire and work Mines* as their own, but limiting the effect of this suspension to the enabling of foreigners to *contract* with the *owners of Mines* [*los dueños de Minas*] for the furnishing of every class of supplies, and "to the power of acquiring the ownership of shares in the enterprise, which they assist, they being subject in every respect to our ordinances for the working of mines, and the reduction of ores, and to the other obligations and charges under which *the Nation grants the ownership*, [*la propriedad*] of such *real estate* [*tales fundos*] to every citizen."

See Galvan's "Decretos y Ordenes," Tomo. 2, p. 192. Translated in Halleck's Mining Laws, p. 403.

By the 7th Article of the "Constitutive Act of the Federation," passed January 31st, 1824, by the *Second* Constituent Mexican Congress," said Federation was made to consist of *States* and *Territories*, the *Californias* belonging to the latter class, and remaining "directly subject to its supreme power."

By the 18th Article, it was provided that the *administration of justice* should be confided to a "Supreme Court of Justice, and to such tribunals as may be established in the separate States," and by the 23d article, that "the Judicial power of each State shall be exercised by such tribunals as may be established *by its constitution*," but that "the Legislatures of the different States may provisionally organize their interior government, and, until that is done, *the laws actually in force las leyes vigentes shall be observed.*"

By Decree of the same Congress, passed July 24th, 1824, in order to *induce* the introduction of capital into the Republic, and its employment in the production of *quicksilver*, there was granted to Don Juan Bautista Binnon "the *exclusive privilege*, for the period of *five years*, of working *Mines of Quicksilver* in the territory of the Republic, he conforming in all respects to the *Ordinances of Mining*" (*a las Ordenanzas de Mineria.*)

By the "Federal Constitution of the United Mexican States," established by said Constituent Congress on the 4th day of October, 1824, Upper California and Lower California continued *Territories* of the Federation, and by Section 5th, Art. 50, Subd. 30, Congress was vested with the power to grant laws and decrees for their *interior administration.*"

By Article 123d, it was declared that "the *Judicial power* of the Federation shall reside in a Supreme Court of Justice, in Circuit Courts (*Tribunales de Circuito*) and in District Courts (*Juzgados de Districto,*) and by Article 160, that "the *Judicial power* in each state shall be exercised by the tribunals which *its constitution* establishes, or designates," &c.

From the time, therefore, the above mentioned "Constitutive Act," and general "Constitution" of the Mexican Federation, went into effect, the *whole Judical power* of the Nation being vested in the "Supreme Court of Justice," in the "Circuit" and "District" Courts, and in *such Tribunals* as the Constitution of each State should "establish" or "designate," all *special* tribunals, such as the "Tribunals General of Mining," at Mexico, and the "Deputations of Mining," (if any such *existed*, in the *Territories*, became *illegal* and *divested* of their jurisdiction, and whether such "Deputations" could, thereafter, exist in the several *States*,

dependent from the time of the adoption of their respective *Constitutions*, wholly, upon the fact, whether they were "established," or "designated" as Tribunals thereunder.

It is unnecessary to our argument to refer to the several *State* Constitutions, for the purpose of ascertaining *what* Tribunals were established or continued by them. It would be found by such reference, that some of them, like the Federal Constitution, vested *all* judicial power in the *ordinary* judicial tribunals, and that others, in part, or in whole, continued the tribunals then existing, until by *law* some other disposition should be made.

See Galvan's *Coleccion de Constituciones de los Estados Unidos Mexicanos.*"

Rockwell, in the preface to his Compilation of Spanish and Mexican Law, [page 22,] says, that, "by a Decree of the Congress of the State of Durango, dated the 23d of November, 1824, it was resolved, that a *Tribunal de Mineria*, or Mining Court, for appeals in the second instance, should be established, to consist of a lawyer and two miners;" that by a subsequent Decree its functions were regulated; that, "by an order of the Congress of the State of Chihuahua, dated the 16th of March, 1826, the *contentious* jurisdiction of the *Mining Deputations* was *transferred* to the *ordinary Courts*," and by a subsequent Decree, said *Deputations* were made subject to the Supreme Government of the State; and that, "by a decree of the Congress of the State of *Guanaxuato* of the 24th of April, 1827, the *contentious* jurisdiction of the *Mining Deputations* was *transferred* to the *ordinary tribunals* of justice, their *ministerial* and *economical* authorities, as well as *the ministerial* and *economical* authorities of the extinct *General Tribunal*, remaining vested in them," and that "these are the *only* regulations by which

any changes of importance are understood to have been introduced into the Mining Laws of the Republic of Mexico, since the ***establishment of its independence.***"

Whether this statement of Mr. Rockwell as to the legislation of the respective ***Mexican States*** upon this subject, is correct or not, we have not the present means of verifying; but one thing seems certain, and that is the only one which has relation to our argument, that, upon the establishment of the Federal Constitution of 1824, no ***special Mining Tribunals*** could thereafter exist in any of the ***Territories*** of the Republic, and that ***all judical power*** upon the subject of mines and miners, was thereby vested in the ***ordinary tribunals.***

This effect is clearly recognized in the Decree of the Mexican Congress of May 20th, 1826, the first article of which is as follows:

"Art. 1. The Tribunal General of Mining ***must*** cease, ***according to the general Constitution***, in so far as it relates to the administration of justice with which it was charged."
Halleck's Mining Laws, 409.

By the second article, it is made to cease, likewise, as to its ***executive***, ***economical*** and ***administrative*** attributes, and, by subsequent Articles, and by the governmental regulation, (*providencia*,) framed for carrying it into execution, its members were formed into a "***Junta Provisional de Mineria***, for temporary purposes, to be succeeded by a ***Junta*** called an "Establishment (*Establecimiento*) of Mining," composed of an agent of the miners, an attorney of the creditors of the mining fund, and a government accountant. The "College of Mining," and the above mentioned "Mining fund," both created under said Ordinances of 1783, were thenceforth committed to the management of said "Establishment of Mining."

The Federal Constitution of 1824 was overthrown in the year 1836, and the "Constitutional Laws" (*leyes Constitucionales*) of the latter year, adopted in its place; but these did not *re-establish* said *Special Mining Tribunals.*

Subsequently, Santa Anna having set aside said "Constitutional Laws," and assumed dictatorial powers under the Plan of *Tacubaya*, on the 27th day of November, 1841, issued a Decree creating a *Junta* to form and present, as soon as possible, a new project for the "*re-establishment* of the *Special Tribunals* of mining, with the modifications which the *present system of government* requires, and those which experience has indicated," etc.

See Lara's "*Decretos y Ordenes del Gobierno Provisional*," 1841–2, No. 183, p. 194.

Translated in Halleck's Mining Laws, p. 425.

On the 11th day of March, 1842, Santa Anna issued another Decree, "permitting foreigners to acquire *real estate* (*bienes raices*) in the Republic," the first and second articles of which are as follows:

"Art. 1. Foreigners who are domiciled and residing in the republic, shall be at liberty to acquire and possess urban and country property, (*propriedades urbanas y rusticas*) by purchase, adjudication, denouncement, or any other title whatsoever established by the laws."

"Art. 2. They shall also be at liberty to acquire *in property* (*en propriedad*) *mines* of gold, silver, copper, *quicksilver*, iron and coal, of which they may be discoverers, ageeably to the *Ordinance* of that branch," (*Ordenanza del ramo.*)

See Lara's Dec. y Ord. del Gob. Prov. 1841–2, No. 325, p. 374.

Translated in Halleck's Mining Laws, pp. 426–429.

On the 12th day of July 1842, Santa Anna issued another Decree, reciting "that the Decree of the 11th of March, of this year, which enables foreigners to acquire *real estates* (*bienes raices*) in the Republic," had given rise to some doubts as to the true meaning (*sentido*) of Article 2d of said Decree, therefore, for the purpose of resolving them, it was declared that,

"Natives, or foreigners, who shall fully prove that they have been *restorers* of ancient *Mines*, decayed or abandoned, shall be considered as *discoverers*, and consequently are enabled, (*habilitados*) by Art. 2, of the Decree of the 11th of March, of this year, to acquire *ownership* (*propriedad*) in Mines.

Halleck's Mining Laws, p 430.

The before mentioned "Establishment of Mining" continued in existence until the 2d day of December, 1842, when, by a Decree of that date, issued by Nicolas Bravo, (provisionally *substituted* as President of the Mexican Republic in the place of Santa Anna,) a new Regulation was made, *reorganiziny* said "Establishment of Mining," under the name of the "*Board for the Encouragement and Administration of Mining*," (*Junta de Fomento y Administrativa de Mineria*,) composed, like the former, of *three* persons, an Agent of the Miners, another of the creditors of the Mining fund, and a Commissioner of the Supreme Government.

The 10th Article of Title 1st of said Regulation, is as follows:

"ART. 10. The attributes of this *Junta* shall be those which include an economical and faithful administration

of the funds mentioned in this Decree, in conformity with the Regulation which it shall draw up and transmit to the Supreme Government for its approval. In this Regulation there shall moreover, be determined, 1st, the manner in which *quicksilver* shall be obtained, distributed, and sold to those who reduce ores, fixing the cases and mode in which *the working of quicksilver Mines in the Republic is to be supplied, rewarded, or in other ways stimulated and protected;* 2d, everything relating to the redemption of the debt of the Endowment fund, according to what may be directed in the respective Title; 3d, The regulation and direction of the *Junta* itself, and, Finally, it shall be an attribute and object of its most efficacious solicitude to promote the *encouragement* of the *business*, (*ramo*) its *funds*, and its *College* (*Seminario*)."

By the 16th Article of the same Title, said Board was empowered to settle the business left pending by the extinguished "*Tribunal of Mining*," and by the "*Establishment of Mining.*"

The 24th, 25th, and 26th Articles of Title 4th, of said Regulation, are as follows:

"Art. 24. The Governors of Departments, in concert with the Departmental Juntas, and with the previous approval of the Supreme Covernment, will establish in each of them the number of Courts of First Instance which are required within their limits."

"Art. 25. Each Court shall be composed of three territorial *Deputies, elected in the manner which is prescribed in the old Ordinance of Mining*, (*Ordenanza de Mineria,*) and, of these three individuals, the first shall be the President of the Court, and the other two associates."

"Art. 26. Each one of these Courts shall exercise, within its territory, the *executive* and *economical* powers given by the old Ordinance of the branch, [*ramo*,] and in *judicial* matters they shall conform to the same Ordinance, so far as relates to the simplicity and brevity of their proceedings."

See said Decree in Lara's "Dec. y Ord. del. Gob. Prov.," 1842–3, No. 549, p. 221–229.

Translated in Halleck's Mining Laws, p. 434–443.

On the 17th day of February, 1843, the same *Substitute President*, by a Decree of that date, reciting that "the high price at which *quicksilver* is now purchased is *injurious to Mining*, the *most important branch of our wealth*, and it is therefore the duty of the Government to provide for the *procurement of an article of so much interest* at the lowest possible price," therefore, the "Junta of Encouragement and Administration of Mining" was authorized "to contract a *loan of two millions of dollars*, in the Republic, or out of it, for the purpose of procuring the *contract of the quicksilver of the Mine of Almaden*," etc.

See Lara's "Dec. y Ord. del Gob. Prov.," 1842–3, No. 592, pp. 297, 298.

Translated in Halleck's Mining Laws, pp. 447, 448.

On the 24th day of May, 1843, Santa Anna having resumed the discharge of the functions of Provisional President of the Mexican Republic, issued a Decree of that date, reciting that, "in accordance with my intentions to *encourage* whatever may contribute to the *National aggrandizement and wealth*, and considering as *one of the means most suitable for that purpose*, the granting of *rewards* and *exemptions* to the *important branch of Mines of quicksilver*, so necessary for the reduction of the precious metals, the

most important branch of the industry of the Republic, without which the others can make no progress," therefore, the exemption of articles of consumption in mining from *excise duty* (*alcabala*) granted by the *Royal Orders* of January 13th, 1783, of November 12th, 1791, of December 6th, 1796, and of August 8th, 1814, should be punctually observed with respect to *Mines of quicksilver* in the Republic; the operatives in *such Mines* should be exempt from all *military service*, and *personal taxes*, no *impost*, general or municipal, should be levied upon quicksilver extracted from such mines; and a reward of *twenty-five thousand dollars* should be paid to every one of the first *four operators* (*empresarios*) who should extract in one year 2,000 quintals of liquid quicksilver from the *Mines of the Republic*, and likewise, a *bonus of five dollars* for *each quintal* of that metal, which should be extracted from *those Mines* during the term of three years, etc.

See said "Decree in Lara's Dec. y Ord. del Gob. Prov.," 1842–3, No. 659, p. 424–425.

Translated in Halleck's Mining Laws, pp. 452–453.

On the 5th day of July, 1843, Santa Anna issued another Decree, which, after reciting his desire "*to encourage* (*fomentar*) and give a *greater impulse to* the important branch of *Mining* which forms the *principal wealth of the Republic*," enacts as follows:

"Art. 1. The Junta of Encouragemement and Administration of Mining is empowered to work, to contract for supplying, and to protect *Mines of Quicksilver* in the Republic."

"Art. 2. The amounts which the Junta may advance, with said object, to the workers (*empresarios*) of mines of quicksilver, besides being secured to its satisfaction, will

bear an annual interest of five per cent., which will go to the funds of that branch."

"Art. 3. The Junta will not contract for the supply of any Mine, without obtaining the necessary data which prove, as far as possible, the *goodness* of the operation (*negociacion.*")

"Art. 5. The Junta will receive, at the price which may be agreed upon with the parties interested, [and which can not exceed the market price,] in payment of the respective capitals and interests, *liquid quicksilver*, and will distribute it among the mines of gold and silver, in a proportional manner, and according to the provisions of the Regulation which, for the useful distribution of this fund, it will draw up, and pass to the Government for its approbation."

"Art. 7. The said Junta will purchase and construct, on account of the *funds which it administers*, the *flasks* required to hold the quicksilver, and will distribute them in the mining departments, in order that it may be transported with security."

"Art. 8. The Junta is empowered to send intelligent persons to *search* for good mines (*criadores*) of cinnabar, to cause those already discovered to be examined, and to dictate *all such measures of favor* [*cuantas medidas parciales*] as experience may suggest, in order that *the production of Quicksilver in the Republic* may be *efficaciously encouraged.*"

See said Decree in Lara's "Dec. y Ord. del Gob. Prov." 1843, No. 698, p. 19, 20.

Translated in Halleck's Mining Laws, p. 454, 455.

The great importance in the opinion of the then Mexican Government of the discovery and successful working

of *Mines of Quicksilver* in the Republic, and its readiness, and even anxious desire to assist and promote this object, by *every available means*, is further shown by the Order of July 8th, and Decree of July 14th, 1843, respecting the raising of a fund for that purpose in the Department of Jalisco, and by the Decree of September 25th, of the same year, intended more fully to carry out and accomplish the objects contemplated by said Decree of July 5th, 1843.

Halleck's Mining Laws, pp 456–458, 459–460.

From this review of Spanish and Mexican legislation, it is evident:

First. That the Spanish Mining Ordinances of 1783, with no important modifications, except those introduced, as we have seen, by the Decrees of the General and Extraordinary Cortes, continued in force throughout Mexico, (including Upper California,) down to the time of its independence of Spain, and thereafter, likewise, subject only to the alterations made by its Constitution and other Laws and Decrees, down to the time of the origination of the claimant's title in 1845.

Second. That under said Ordinances of 1783, the Tribunals therein provided for, under the name of "Deputations of Mining," could only exist where there were "*Reales*" or "*Asientos*" of Mines and Miners who had been engaged for more than one year next preceding in working and supplying such Mines and reducing their ores, inasmuch as the "Deputies" to compose such Tribunals could only be appointed by the election of such Miners.

See Ordinances of 1783, Tit. 2, Arts. 2, 3, 4, 7, 8.
Halleck's Mining Laws, p. 201–203.

Third. That, in the absence of such "Deputations of Mining," the respective Royal Judges (*Justicias Reales*) were Judges of Mines.

See Ordinances of 1783, Tit. 2: Art. 1.

Halleck's Mining Laws, p. 201.

Fourth. That under the "Constitution of the Spanish Monarchy" of 1812, and the Decrees of said General and Extraordinary Cortes, the jurisdiction of said Royal Judges, (*Justicias Reales*) was vested in the Judges of Partido and First Alcaldes of Towns.

See Arts. 273, 274, 275 of said Constitution.

Also, "Reglamento de las Audiencias y Juzgados de Primera Instancia, "Cap. 2 Arts. 1, 3, 4, 7, 8, 28, 29, 30, 32, 33; Cap. 3, Arts. 6, 7, 10, 11; Cap. 4, Arts. 1, 3, 5; in Galvan's "Decrees of Cortes," p. 45–52.

Fifth. That no "*Reales*" or "*Asientos*" of Mines, having existed in upper California prior to the Mexican independence, as a consequence, no such Special Mining Tribunals could have existed there.

Sixth. That, by the Mexican Constitution of 1824, the Judicial Power vested by said Ordinances of 1783 in said Mining Tribunals, was transferred to the ordinary Courts of Justice created by said Constitution, so far as the Federal Territories were concerned, and continued to exist in such Tribunals in the Mexican States, only where their respective Constitution so provided; and that the economical and administrative powers of said Tribunals, were vested in the Executive Departments of said Federal and State Governments; the gen-

eral non-existence of such Special Mining Tribunals throughout the Mexican Republic on the 27th day of November, 1841, being shown by the Decree of that date, referred to in the foregoing abstract, proposing their re-establishment.

Seventh. That upon the abolition of said "Tribunal General of Mining" by said Decree of May 20th, 1826, in consequence of the incompatiblity of its judicial functions with the Federal Constitution of 1824, the Junta, called the "Establishment of Mining," was created, as the medium and instrument through which the Federal Executive should exercise the economical and administrative powers over the subject of Mining, which had been, until then, exercised by said Tribunal, and that, after the overthrow of said Constitution of 1824, and said Constitutional Laws of 1836, and the assumption of absolute powers by Santa Anna, and Nicolas Bravo, as his substitute, by said Decree of December 2d, 1842, said "Establishment of Mining" was re-organized into said "Board of Encouragement and Administration of Mining," and "Courts of First Instance of Mining" were established, both being formed substantially upon the models of said "Tribunal General" and "Deputations of Mining."

Eighth. That, for the same reason above referred to, to wit: That there were neither Mines discovered, nor Miners engaged in working them, (except in the present case) in Upper California, prior to its acquisition by the United States, no "Courts of First Instance" of Mining were ever established there, under said Decree of December 2d, 1842; said Decree directing the estab-

lishment of such Courts in the several Departments of the Republic, (with the "previous approval of the Supreme Government,") only when "required," and likewise directing that the three Territorial "Deputies" to compose such courts, should be "elected in the manner which is prescribed in the old Ordinance of Mining," that is, by the Miners of each "Real" or "Asiento" of Mines, one of which existed in Upper California.

See said Decree, Tit. 4. Arts. 24 and 25.

Halleck's Mining Laws, p. 441.

Ninth. That in the absence of any such Special Mining Courts in Upper California in 1845 and 1846, the First Alcaldes of the Districts within which Mines might be discovered, had jurisdiction to make registry, and deliver judicial possession of such Mines.

Tenth. That the discovery and working of quicksilver mines in the kingdom of New Spain, aftewards the Mexican Republic, was, from the time at least, of the assembling of the extraordinary Cortes in 1811, down to 1845 and 1846, regarded by the Government as an object of the utmost importance to the industry and prosperity of that country, and, as an object, the pursuit of which involving very heavy expenditures, was therefore to be fostered and encouraged not only by pecuniary rewards, but by special favors, privileges, and exemptions.

Eleventh. That, among the attributes of grace and favor exercised, first by the Viceroy of New Spain upon recommendation of said "Royal Tribunal," and afterwards by the Supreme administrative power

of the Mexican Republic upon like recommendation of said "Junta de Fomento," for the encouragement of important enterprises in Mining, was that of granting to those who undertook such enterprises, a much larger number of Mines or extent of Mining territory than was granted in ordinary cases, and that this partiality was *fully authorized*, both by said Mining Ordinances of 1783, and by the Laws and Decrees of the Mexican Republic.

See Ordinances of 1783, Tit. 6, Arts. 6 and 17; Tit. 10, Art. 17; Tit. 11, Art. 1.

Halleck's Mining Laws, pp. 225, 229, 251, 252.

In corroboration of this last proposition, it may not be wholly unnecessary to add a brief extract from the work of Teodosio Lares, a writer of standard authority, on the *Administrative* Law of Mexico. He says:

"According to them," [the Ordinances of 1783,] "it is beyond all doubt that the *title* by which Mines are acquired, is the *concession;* but this does not belong to the *administrative* power, but to the *special tribunals* which the same Ordinances establish and to which appertains the cognizance of *registries* and *denouncements*, contentious jurisdiction being granted to them over all suits in which are involved questions relative to the acquisition, preservation and forfeiture of Mines. *Only in the case of the undertaking of the working (habilitacion) of many Mines (muchas minas) or other considerable enterprise of that kind, does the making of the concession belong to the Government (la Gobierno,) upon the report (informe) of the Tribunal General*, to whom application must be made with the petition:"

See Lares "Derecho Administrativo," p. 91.

Returning, then, from this review of Spanish and Mexican legislation, to the *first* question proposed to be considered in this Brief, to wit:

What was a Mine under Mexican Mining laws, and of what composed, and what were the rights, both to the mineral and to the surface and soil, which its acquisition according to those laws conferred?

It seems to us:

First. That the answer to the former part of this question, as to what a "Mine" *was* under Mexican Mining laws, has already been most clearly shown by the literal quotations which we have made, not only from those laws themselves, but from the more early Spanish laws upon which the latter were founded.

In the 5th Article of the very Law of 1559, from which we have already quoted, declaring the incorporation of Mines into the Royal Patrimony, it is distinctly stated, that the "Mine" of the discoverer "shall be *one hundred varas long and fifty varas wide*, as he may select it," and, by a Law of the Indies of the same year, the *same rule* for fixing the *boundaries* of "Mines," was extended to those Kingdoms.

So in Article 22d of the Ordinances of 1563, called the "Old Ordinances," it is declared that the "Mine" of the discoverer and registerer of a new vein, shall be "a *space* of *one hundred and twenty varas in length upon the vein, and sixty in width*," and that, at the stakes of such first discoverer, "*one Mine*" shall be left for the King, of the "same *dimensions*" as that of such first discoverer, and that "*each*" of the "Mines" thereafter taken, "*shall be one hundred varas long and fifty wide.*"

Again, in Article 23d of the Ordinances of 1584, called the "New Ordinances," it is provided, that the "Mine" of the discoverer and registerer of a new vein, shall be "a *space of*

one hundred and sixty varas in length upon the vein, and eighty in width," and that "*each*" of the "Mines" taken after those of the first discoverer, "shall be *one hundred and twenty varas long and sixty wide;*" and, in

Article 26th, that in setting out the stakes for the establishment of the *boundaries* of such "Mines," care shall be taken "to make *an oblong with right angles,*" &c., and in

Article 70th, that the "Mine" of a *discoverer of gold*, shall be "a *space of eighty varas in length and forty in width,*" and of others subsequent to him, "a *space of seventy varas long and thirty wide.*"

And in the 8th Title of said Ordinances of 1783, (which, upon *this svbject*, was the law of Mexico in 1845 and 1846,) prescribing the *dimensions* which, in future, "Mines" are to have, it is provided in Articles 2d, 3d, 4th, 5th, 6th, 7th and 8th, that the "Mine" of every Miner, without distinction of discoverers, and whether said Mine be of gold, silver, or *any other metal*, shall be "*two hundred Castilian varas* on the thread, direction, or course of the vein," and, "to make a *square or rectangle* with the preceding measurement," the *width* of such "Mine" shall vary from "*one hundred varas*" when the vein is perpendicular to the horizon, to "*two hundred varas,*" when its dip is at an angle of forty-five degrees; and, in Article 11th, that the Miner, "at the time of taking possession of the "Mine," shall set up in his *boundaries* stakes, or *Land-marks, (mojones)* secure and easily distinguished, with the obligations of having them kept and preserved *perpetually*," etc.

Language, it seems to us, could scarcely be plainer in declaring that, what under the Spanish and Mexican Laws

was called a "Mine," was a *specific piece of ground*, small in extent, but of *definite length* and *width*, with *boundaries* precisely, and often *judicially*, marked out and established by stakes or land-marks, which were required to be *perpetual*: and included, not only the *mineral* contained in, and which constituted a part of, the *substance* of the soil, but likewise, the *surface* and *soil* to the limited extent of its *boundaries*, the latter being granted, evidently, for the convenient and necessary use of the Miner in the extracting of said mineral; and that, whilst the ordinary Miner could acquire by registry only *one* such "Mine," the discoverer of a *new vein* in a hill previously worked, could acquire *two*, the discoverer of an *absolutely new hill*, *three* on the principal vein, and *one* on every other vein which he should discover, and that *any number* of such "Mines" could be acquired and held by *purchase*, *inheritance*, or other such lawful title, or be *granted* by the Supreme Executive upon the *recommendation* of the "Royal Tribunal of Mining," whilst it existed, afterwards, of the "Establishment of Mining," and finally, of the "Junta de Fomento" of Mining, as an act of *favor* and *assistance* to some *important enterprise*, which it was the policy and interest of the Government to *aid* and *encourage*.

Second. That the answer to the *latter* part of said question, to wit: *What were the rights both to the mineral and to the surface and soil, which its acquisition according to those laws conferred*, can scarcely admit of more doubt than the answer to the former part, though it will require a somewhat more extended consideration.

As we have already seen, by the Spanish law which continued in force after the Mexican independence, the owner-

ship of all mines of gold, silver, *quicksilver*, and other metals, not granted to individuals, was in the Crown. By that independence, and the Republican Constitution thereafter adopted, this ownership passed to, and vested in the *Mexican Nation*.

On this point, *Lares*, after reviewing the various acts of *Spanish* legislation on the subject of mines, says:

"Such were the principles adopted by the legislator, and such the dispositions relative to the acquisition and government of the Mines, which were in force at the time of the consummation of the grand work of the National Independence.

The Mexican Nation, having been declared free and independent of the Spanish government and of every other power, the Seigniory (*señorio*) of the King of Spain over the mines absolutely terminated, in like manner as terminated all the dominion and sovereignty which he might have exercised over the territory of the Nation. What are, then, the principles recognized at present by legislation, in regard to the ownership of the Mines?"

"The legislator has not occupied himself, at all, in making a *formal declaration* upon the matter, like that which was made in France in 1791, nor upon a regulation, complete and definite, like that of 1810, but, in those partial provisions which he has made upon the branch of mining, he has recognized in a manner *implied*, but clear and evident, the principle, that the Mines belong to the *Nation*, declaring expressly that to it alone does it appertain *to grant* (*conceder*) this class of property (*esta especie de propriedad.*) Thus it is, that in the decree of the General Congress of October 7th, 1823, enabling foreigners to make with the owners of mines (*dueños de minas*) contracts for every kind of supplies, even to the

extent of acquiring in ownership shares in the operations which they supply, he reminds them that they have to remain subject in everything to our Ordinances, for the working of the mines, and to the other obligations and charges under which the *Nation grants* (*concede*) *the ownership* (*la propriedad*) of such parcels of ground (*fundos*) to every citizen."

"Two principles, each most important, the legislator recognizes in this notable disposition ; the first, that the Ordinances of mining (*Ordenanzas de mineria*) are in force, and that by them must be regulated the working of the mines; the second, that it is the *Nation* which grants (*concede*) the ownership (*la propriedad*) of the mines. But how could the Nation *grant* that which it *has not?* And how would it be able to give to *one* that which it might have acknowledged to belong to *another?* The law, therefore, has not recognized the property (*propriedad*) of the "Mine" to be in the owner of the field, (*dueño del fundo,*) but has made it to consist in the *grant* (*concesion*) which the *Nation* makes to him who registers, or denounces it in conformity to the Ordinance."

"The same was the conception of the Decree of March 11th, 1842, which empowered foreigners to acquire real property (*bienes raices*) in speaking of the *mines*, it empowers them to acquire in ownership (*en propriedad*) those *of which they should be the discoverers, in conformity to the Ordinance upon that branch.* Here, again, is seen united the ownership (*la propriedad*) with *the grant*, (*concesion,*) through the medium of the discovery, in the terms which the Ordinance prescribes."

"There is, therefore, no doubt that our legislation, like the French, distinguishes the property of the *soil*, (*la propriedad del suelo,*) from the property of the *mine* (*la propriedad de la mina;*) recognizes that only the *Nation* can grant the latter property (*propriedad;*) and establishes that the *grant*

(*concesion*) is made in the manner which is determined in the Ordinance of 1783."

Lares' Derecho Administrativo, pp. 91–93.

It will be seen from this extract from this standard Mexican law-writer, that the Mexican *Nation*, from the time of its Independence, was considered as having succeeded to, and as holding the property of the Mines, subject to the *same laws* which had previously, under the Spanish Dominion, fixed the *nature*, defined the *character*, and *incidents*, and regulated the *mode of acquiring* and *holding* such property.

According to *those laws*, as indicated in the preceding quotation, there were two *distinct rights of property* in land containing metals or ores, one, the right to it generally in large quantities, for the purposes of Agriculture, pasturage, and the *ordinary profits* of its *surface* and *soil*, and the other, the right to it in parcels of very *small extent*, for the purpose of extracting therefrom and reducing said *metals* and *ores*.

So entirely distinct in nature and fact were these two rights, that they never passed by the *same grants*, except in very early times, and even then, a grant of land, in the *ordinary* form, was insufficient to pass *any right* whatever to the *metals* or *ores* which it might contain.

Gamboa, speaking on this subject, says:

"In Spain, under the law of the Partida, the *property of the mines* was so vested in the King, that *they were held not to pass* in a *grant of the land*, although not *excepted* out of the grant, &c."

See Rockwell's translation, p. 126.

Again: "As a consequence of this liberty to seek for mines, extended absolutely to all persons, it follows, that they must be regarded *as not having passed with the grants of land from the* Sovereign, unless *particularly mentioned* in the grant, or unless a case of immemorial prescription be made out. But, except in these two cases, no person, of whatever condition, rank, or dignity, can prevent their being searched for in *his farms, pastures, inheritance*, or *other place*," etc.

Rockwell's Translation, p. 166.

And again: "The question may be raised, whether, upon the discovery of a *mine* in another proprietor's ground, the *owner of the soil* is entitled to claim *precedence* of, and *oust, the discoverer?* To which we reply, on the authority of *Baldus, Paulo de Castro, Rosenthal, Petrus, Barbosa, Bartholo*, and *Cepola*, all of whom are cited by *Antunez*, that the *discoverer* is to be preferred before the *owner of the ground*, provided he comply with the directions of the Ordinances concerning registry; *first*, because he who first takes possession according to law, is in a better condition; *second, because the mine or vein is not part of the estate, nor did it pass with the land*," etc.

Rockwell's Translation, p. 169.

So, Solorzano in his Politica Indiana, Lib. 6, Cap. 1, No. 17, says:

"*Mines* are held as so called *Royalties*, (*Regalias,*) that is, as *property* (*bienes*) belonging to the Kings and Superior Lords of the provinces where they are found, and, as belonging to, and incorporated by law and custom into the Royal Patrimony and Crown, whether found and discovered in public places, or in the lands and possessions of private persons; so that, although the latter may allege and prove that they

possess such lands, and their appurtenances, by *special gift* and *concession* from the *same Princes*, no matter *how general* may be the words in which it is made, this will not, of itself, be of any avail or advantage to them for acquiring or gaining thereby *the mines* which may be discovered in the lands, unless it is so *especially provided and expressed in said grant.*"

And *Lares*, upon the same subject, says:

"Thus, according to this right (*derecho*) of *Royalties* (*Regalias*) the property (*la propriedad*) of the mines, and the property (*la propriedad*) of the surface, (*la superficie,*) were wholly distinct (*del todo distintas*); that of the surface pertaining to *private dominion*, (*dominio privado,*) and gave the right to indemnification if it was damaged; the other, pertaining to the *dominion of the Crown*, (*al dominio de la Corona,*) and was the object of privileges and concessions, (*concesiones*) which were multiplied, and, *oftentimes, without indemnification to the proprietor of the soil.* This is the principle of the right of Royalties (*Regalias*) which, according to Laferriere, governed as to Mines in France, *until the Revolution.*"

"And this same principle was adopted by almost all nations, who, in their statutes aud particular laws, declared as Royalties and Patrimony of the Sovereigns, the veins of precious metals, wherever they might be found, whether in public places, or in estates or lands of individuals. Thus it became established in Germany, *Spain* and Portugal," &c.

Lares' "Derecho Administrativo," p. 85.

There being, then, according to Mexican laws, these two distinct rights of property in land, one the right to its *mineral*

profits, and the other the right to the profits of its *surface* and *soil*, both originally vested in the *Nation*, one of which was passed from said Nation to a private owner by means of the *ordinary grant*, and the other, passed from said *Nation* to a private owner who had discovered *metal* or *ore* therein, by what was called the grant or concession of the *Mine*, let us examine for a few moments the *nature* of this latter "concession," and the *principles* upon which it was founded.

We have already seen that the object of the incorporation of all mines into the royal patrimony was, that the *grant of them* might be offered and made by the Sovereign to all of his subjects who would expend their *labor* and *means* in searching for, discovering, and working them.

The mines, that is, *metals* and *ores*, though a part of the *substance* of the land, were considered as *treasures* hid in the bowels of the earth, in places unknown, of *inestimable value*, and which, being the *property of the Sovereign*, it was his interest and that of the *public* which he represented, to have *discovered* and *brought into use* to enrich the Nation. Hence, the offer of the *free grant* of these mines, in parcels of *small extent*, but proportioned to the great wealth of their products, and the ability of *individuals* ordinarily to extract them, subject only to the *payment* to the Crown of the proportion of the metal, when extracted, which it reserved to itself, which at first indeed, was the *lion's share*, but afterwards successively reduced to the *half*, the *fifth*, the *tenth*, and finally, by the Decrees of the Spanish Cortes, and of the Mexican Government, *abolished altogether;* and subject likewise to the *registry* and *working* of such mines in the manner prescribed by the laws on the subject.

When, therefore, an individual, in reliance upon this Sov-

ereign offer, expended his labor and means in the search for and *discovery* of a vein of metal or ore, he acquired an *incipient*, but just and meritorious, *right* to the proffered grant of a "*Mine*" thereon, and this, both as against the *Crown* and as against *all other persons*.

Febrero, an author of the highest authority upon Spanish and Mexican law, in treating of Dominion and the *modes of acquiring* it, specifies "*Discovery*" as one of the modes of *occupation* by which such dominion is acquired, and says that *this mode* is that by which *treasures*, and *Mines* are acquired.

See Febrero Mexicano, Vol. 1st, Lib. 2d, Tit. 1, Chap. 2, Arts. 17, 19.

So, likewise, the author of the Mexican Compilation, entitled "*Ordenanzas de Tierras y Aguas*," makes the same classification, and attributes to the *same cause* the *origin* of the *title* to a *Mine*.

See "Ord. Tier. y Ag." p. 43, Chap. 2d, Art. 47.

The discoverer, then, having by such *onerous* cause or consideration, acquired an incipient *right to* a "Mine" or "Mines" upon the *vein* or *veins* discovered by him, let us see how this right was *perfected* into a *legal title*, and the *full* "*concession*" and complete *dominion* over it, or them, obtained.

This "*concession*," as we see by the *officers* through whose *instrumentality* the *Nation* made it, as well as learn from Spanish and Mexican law-writers, was ordinarily a *Judicial* act.

Lares, speaking on this subject, says :

"And as this Ordinance has not devolved upon the administrative power, but upon the *Judicial*, the cognizance of the denouncements and registries of mines, for *the granting of them in ownership*, (*en propriedad*,) it follows, as we have already said, that with us, the *concessions*, (*las concesiones*) to which the mines give occasion, are not *administrative* acts."

"By seeking further to distinguish in these concessions that which touches the rights of the *owner of the soil*, (*dueño del fundo*,) from that which belongs solely to the general interest of the working [of the Mine,] there would be separated that which properly appertains to the *Judicial* power, from that which should properly remain reserved to the *administrative* power. Until that is done, there is no other rule to follow but the Ordinance."

See *Lares' Derecho Administrativo*, p. 93.

This exercise of the *granting* power by a *Judicial* Officer, was not peculiar to the concession of a "Mine." It existed equally with respect to the grant by an Alcalde or Justice of the Peace of a *house lot (solar)*. Both were "*adjudications*."

In the grant of a *house lot* the applicant appeared before the officer with a statement in writing or petition, setting forth his nationality, residence, profession, and employment, his family, and the need he had for the lot, with the other circumstances entitling him, as he claimed, to the favor, describing the lot which he asked for, and alleging that it was vacant and unoccupied, and not lawfully claimed by any other person. The officer thereupon noted his application, and proceeded to ascertain the existence of the facts alleged in the petition, by proofs, if necessary, and, having ascertained them to his satisfaction, *adjudicated* the lot to the petitioner,

and, proceeding to the ground, placed him in the actual and *Judicial possession* of it, causing him to fix stakes to designate its *boundaries*, and *registering* the grant, and delivering to him his petition with said *grant (adjudicacion)* and certificate of the delivery of *Judicial possession* endorsed thereon, or added thereto, to serve him as *a title*.

The only *onerous* consideration paid at the time for such grant, was the officer's fees, and the Municipal Tax *(Derecho Municipal)* imposed thereon. It had, like the grant of a *Mine*, its *conditions subsequent*, upon *breach* of which a *forfeiture* would accrue, and it would become liable to *denouncement*, and to be *re-granted* to the *denouncer*, or to some other person.

Almost precisely similar were the proceedings in the grant of a "*Mine*," with only the difference occasioned by the different character of the property, and the different purposes and end for which it was granted.

These proceedings we will recite in the condensed and clear language of the *Febrero Mexicano*, published in the year 1834; when, as we have seen, the old *Mining Tribunals* had been, for the most part, superseded by the Tribunals established by the *Constitution* of the *Mexican Republic*, and those of the several States:

"He who may have discovered a mine or vein shall present himself with a writing *(con escrito)* to the *Judge of the Place, (al Jues del Lugar,)* expressing in it his name, and those of his partners, if he has any, the place of his nativity, his residence, profession, and employment, and the most distinguishing and characteristic features of the locality *(sitio,)* hill *(cerro)*, or vein *(veta), of which he claims (pretendiere) the grant (adjudicacion);* all which circumstances, and the

hour at which the discoverer shall have presented himself, shall be entered *(se sentaran)* in a *Book of Regesteries*, which the notary of mines, if there be one, ought to keep; and that being done, there shall be returned to the discoverer his writing adjusted for his due security, and there shall be fixed notices on the doors of the Churches, National Houses, and in other public places of the settlement (*poblacion*) for the *necessary information*."

"Moreover, within ninety days, the discoverer must have sunk on the vein, or veins, of his registry, a shaft, of a vara and a half in diameter at the mouth, and ten varas down, or in depth, and, as soon as that has been accomplished, *the Judge*, (*el Jues*,) accompanied by the notary, if there should be one, and, for want of one, by *two assisting witnesses*, (*testigos de assistencia*,) and by a professional mining-expert, shall pass personally to the examination of the course and direction of the vein, its width, and other circumstances, an exact account of all this being taken, in order that it may be added to the corresponding part of *its registry*, with the authenticated act *of possession*, which shall *immediately be given* to him in the *name of the Nation*, measuring to him his *mining-ground*, (*pertenencia*,) and causing him to fix *stakes* in *its boundaries*, (*sus terminos*;) the which being done, there shall be delivered to him an *anthenticated copy* (*copia autorizada*) of the proceedings, (*diligencias*,) as a *corresponding title* (*titulo correspondiente*). If, during the said ninety days, any one shall appear pretending to have a right to that discovery, he shall be heard briefly in court, (*en justicia*,) and it shall be *adjudicated* (*se adjudicara*) to him who best proves his claim, *but, if he appear afterwards, he shall not be heard.* When the question shall present itself as to who has been the first discoverer of a vein, he shall be held as such who shall prove that he first found *metal* in it, notwithstanding others may have tried it

previously, and, in a case of doubt, it shall be decided in favor of him who first registered it."

Febrero Mexicano, Vol. 1, Lib. 2, Tit. 1, Cap. 2, Art. 21.

How almost exactly similar are the proceedings in these two cases, in their *general outline*, as well as in their legal effect. In both, the *agent* of the *Nation*, empowered to *pass the title*, was a *Judge*. The *act* of passing it was a *judicial* one. The pretender to the grant presented himself before this officer with a *written statement*, or petition, setting forth, first, his nationality, or place of birth, his residence, profession, and employment, and, in the one case, his family, and the need he had for the lot, and, in the other, the *discovery* of a vein of metal, or ore, which he had made, *entitling* him to the *concession* of a *Mine*, or *Mines* thereon, and in both cases, *describing the property* the grant of which was asked, by the most convenient and certain mode of *indentification* according to its *different circumstances* and *situation*, and alleging the non-existence of any prior or superior claim. The Judge, thereupon, noted, or entered in his registry, the application, or claim, and immediately took steps, or caused them to be taken, for the ascertainment or demonstration, of the truth of the facts upon which said applications were respectively founded, and likewise, to ascertain the non-existence of any such prior or better claim; and finding none, and the truth of said facts appearing, *adjudicated* (that is *granted*,) such property to the respective applicants, going personlly upon the ground, and measuring to them the lawful *dimensions* of their respective *parcels of ground*, and *delivering* to them the *actual possession* thereof, causing them to fix *stakes* or *landmarks* for the establishment of their *boundaries*, and delivering to them, respectively, either the original, or a certified copy of the proceedings, as their *Title* to said property.

If we now revert again to the doctrine of the Spanish and Mexican law, as to the "*dominion* of things and the *mode of acquiring it*," we shall find *every requisite* of that law for the transfer of such dominion, most clearly existing, and complied with, in this, "*concession*" of a Mine.

We have already stated, and shown by quotations from the best Spanish and Mexican legal authorities, that *discovery*, under the offer made by the *Crown* and *Nation* to its subjects and citizens, gives the incipient and meritorious *right to a "Mine,"* and it only remains to be demonstrated, that the subsequent acts of registry, notification, sinking the shaft, and *adjudication* of the *property* of such Mine to the discoverer, completes and *perfects* his *right to* the same, and that the immediately succeeding act of Judicial *delivery* of such Mine to such discoverer, *transfers to him the dominion.*

Let us now see what are the established doctrines of the Spanish and Mexican law on these subjects.

Don Jose Maria Alvarez, in his "Institutes of the Royal Law of Spain and of the Indies," says:

"As dominion is the highest species of right in things, before treating of it and of the mode of acquiring it, it is necessary to explain, 1st, What is right *in the thing* and *to the thing*, and how many kinds there are of the one, and of the other. 2d, What is *dominion*, and how it is divided. 3d, What is meant by *mode of acquiring* dominion. 4th, How they are divided, and *how many* are the modes of acquiring it.

"Sec. 1. *What is right in and to the thing.*

"The *first*, is a faculty which belongs to a man in a thing certain and determinate without reference to *any person*. The 2d, on the contrary, is the faculty which one *person* has against *another*, to oblige him that he give or do something."

"The differences of one and the other right are clear. 1st, When I have a right *in the thing*, the *thing* is that which is bound to me, and when I have a right *to the thing*, the *person*."

"2d. By right *in the thing*, I demand that which already is mine; and by right *to the thing*, I demand that there be given me or done for me that which another is under obligation to give me, or do for me."

"3d. From right *in the thing* originate real actions, against any possessor whatever, and from right *to the thing*, only personal ones, against that *particular person* with whom the contract was made. By the example which is presented in the case of a thing in which dominion is held being lost or stolen, and, in the case of another being bought, and not delivered, will be seen clearly the distinction between both rights."

"Of rights *to the thing*, there is no more than one kind, and that is *obligation;* but of rights *in the thing* there are various. Four are commonly enumerated, *dominion*, *inheritance*, *servitude*, and *pledge*."

"Sec. 2. *What dominion is and its divisions.*

"The highest species of right *in the thing* we say is called dominion: *this is the right thing in a corporeal, from which arises the faculty of disposing of it, and of reclaiming it, in case law, contract, or the will of the testator does not forbid.*"

"We say *right in the thiug*, because to the lord (Senor) the *thing* is in such manner *bound*, that it may be withdrawn from any possessor whatever. It should be in a thing necessarily *corporeal*, because *incorporeal* things are not *in dominion*, but in property (*bienes*). It is said, also, *from which arises the faculty of disposing of the thing and of reclaiming it*, because he who is lord has, in the first place, the faculty of disposing of his things, using them to the exclusion of every other person, may give, sell, and transfer it to another as he pleases, and has, in the second place, the faculty of reclaiming it, that is,

withdrawing it from any possessor whatever. But, nevertheless, to meet various cases, it is added in the definition, *in case law, contract, or the will of the testator does not forbid: law*—for example—it is forbidden that we should reclaim the things which already have been prescribed against us; *contract*—it is forbidden to the feudatory to alienate the land although he is master of it; *will of the testator*—and it is finally prohibited to alienate a thing left by the testator with the condition of never alienating it."

"Dominion is divided into *full* and *less full*. The first is where the faculty of *disposing* of the thing, and that of *using* it, are *joined in one person*. The second, is where these two rights are *separated*, so that one person holds the *one*, and another distinct, the *other*. For example, in the *feud*, the vassal has the right of taking the *profits* (*utilidades*) of the thing, but not that of *disposing* of it, at his will; that is *divided* between the *lord* and his *vassal*, in such manner that the latter cannot alienate the land, nor hypothecate it, without the consent of the *lord*, since neither of the two hold *full* dominion, but *less full*."

"This dominion *less full*, is divided into *direct* and *useful*: he who has the faculty of *disposing* of the thing, will have the the *direct* dominion, and he who enjoys only its *profits*, the *useful* dominion.

The *enfiteusis* will serve us for an example: the *lord* of the enfiteusis holds the *direct* dominion, and the *tenant* (*enfiteuta*) the *useful* dominion.

"*Sec. III. What is meant by mode of acquiring dominion:*

"The distinction is worthy to be noted which is encountered between the *title* and the *mode of acquiring* dominion; and should be kept in mind in all that is treated of hereafter."

"All dominion has two causes, *proximate* and *remote*. *Proximate* is that by which, without the intervention of any

other thing, the dominion is obtained; and that is called *remote* which ought to precede it, and by means of which, it is acquired. For example, if I buy a jewel of Ticio, and he delivers it to me, I acquire dominion. In this case, the *delivery* (*tradicion*) is the *proximate* cause, and the *contract of purchase* is the *remote* one. The proximate cause is called *mode of acquiring*, and the remote, *title* (*titulo.*)"

"The *effects* of these two things are likewise different.

1st. By the *title* is acquired, only, the *right to the thing;* and by the *mode of acquiring*, the right *in the thing.* 2d. The *title* gives only an action *personal* against that person with whom we *contracted*, and the *mode of acquiring* gives a *real* action against *any possessor* whatsoever."

"It serves then for a *general* rule, that the *title* never gives a right *in the thing*, if there is not *added* to it *delivery* (*tradicion.*)"

"Therefore, although I may have bought any thing, or it may have been given, or bequeathed to me, I am not *lord* of it before that the *delivery* (*la entrega*) takes place, which is that which, alone, *transfers the dominion* or *right in* the thing, provided always there precedes *title* sufficient to transfer the dominion."

"Therefore, neither *title* suffices, without *delivery*, nor *delivery*, without *title.*"

"This is so, notwithstanding that some cases are met with in which right *in* the thing is conferred, *without delivery*, on account of its not being possible."

"1st. In the mortgage (*hypoteca*): The thing is not delivered to the creditor, as other pledges, and nevertheless, produces a *right in the thing* by the contract alone, without delivery, it being established that the creditor has an action *real*, although he has not received, nor possessed, the thing hypothecated."

"2d. *In the negative servitudes:* Servitudes (*Las servidum-*

bres) are *rights*, and these are *things incorporeal*, in which, from their nature, *delivery* cannot take place, but *quasi delivery*. This *quasi delivery* consists in its exercise by one, and its tolerance by the other; for example, if one has promised me the servitude of way (*camino*) through his field (*fundo*), and I, in virtue thereof, come, go, and exercise the said servitude, then it will be said that it is *quasi delivered* to me. But this only can take place in the *affirmative* servitudes, as of gutters, ways, drains, and others similar. But not in those which are called *negative*, because in them, it is impossible that either delivery, or quasi delivery, should take place; for example, if I promise to Ticio the servitude of not raising my walls, in this case, I have nothing to deliver to him, nor he to exercise, so that by the *agreement alone*, which has preceded, he holds the *right in* the thing, that is to say, by means of the *title* only." * *

"Sec. IV. *How are divided, and what are, the modes of acquiring dominion.*"

"Some modes of acquiring dominion have their origin from the law of nature and of nations, and these are common to all nations, and others are derived from the civil law, and differ according to the laws of the people. Delivery, for example, is a mode of acquiring common to all nations, on the contrary prescription either is unknown, or at the least it is regulated by different rules, from whence it may be inferred, that delivery is a mode of acquiring by the law of nations, and prescription by civil law."

"Of natural modes of acquiring, some are called *original*, and others *derivative*. If we acquire a thing which is not under the dominion of another, as a wild beast, or a fish, etc., it will be a mode of acquiring *original;* but if a thing which is in the dominion of another is *transferred* to us, and *delivered* by its lord, it will be *derivative*. * * * * *

"From what has been said may be clearly inferred the *natural* modes which there are of acquiring. One is original *perfect*, and is called *occupation;* another is original *less perfect*, and is called *accession;* and another, *derivative*, which is called *delivery.*" * * * * * * *

"Sec. VII. *Of delivery, the only derivative mode of acquiring.*

"We have seen already the ordinary modes of acquiring: the *derivative* follows, which is *one only*, and is called *delivery* (*tradicion*). We have said that the *derivative* mode of acquiring is when the dominion is transferred from one to another; and thus we shall define *delivery* by saying, that it is *a derivative mode of acquiring by which the lord of the thing, who has the right, and mind or intention, of alienating, transfers, with just cause, a corporeal thing to him who receives it.*"

"From hence spring three axioms:

1st. *That only things corporeal can be delivered, since only these can be transferred by corporeal act, from one to another.*

"For this reason, things *incorporeal*, as *rights*, are not *delivered*, but are *quasi-delivered;* and the quasi-delivery consists in the *sufferance* of one, and the *exercise* of the other. From the same definition is collected that delivery is either *natural* or *symbolical, short hand*, or with *long hand*. *Natural* delivery is when by *corporeal act* the thing is transferred to the subject who receives it. It is called *symbolical*, when one thing is delivered in *token* of another, the dominion of which it is desired to transfer; e. g., if the keys of a granary are given which encloses the wheat which was sold, the delivery is said to be made with *long hand* (*longa manu*) when the thing is placed in

the presence of him to whom it is delivered, but he does not touch it except with his eyes only. An *equivalent* to actual delivery is called *short hand* (*brevis manus*), and takes place when one who is already in possession of the thing, is considered as having received *delivery* thereof, in virtue of which the owner, some contract preceding, grants it to him in full property: e. g., I loan to Ticio a book, afterwards I sell it to him, and say to him, supposing it in his power, that it may remain with him; in this case, it is the same as if it were "*delivered.*"

"*Axiom* 2*d. The thing ought to be delivered by its lord.*

"The reason is, because that which one has not, he cannot give to another; and thus, if I have received anything in good faith from one who is not lord, this will make me possessor in good faith, but not lord. The minor, as little, can transfer dominion, because, although he is lord, he is not held a perfect person, for defect of judgment, and thus can do nothing whence may result injury to his condition, without the authority of his guardian, and consequently cannot transfer dominion."

"*Axiom* 3*d. Dominion is not transferred if there is not the intention of alienating.*

"The reason is, because to the lord only it belongs to give the law to his things, and to dispose of them; and if he disposes that only the use or the custody of his thing shall pass, he who receives it by this delivery will not be made lord: e. g., if I give in deposit, or on lease, or loan, my thing (*cosa*), delivery takes place, but the depositary, lessee, or borrower, are not made lords (*duenos*) of it, because in me there is wanting the intention or will to alienate it."

"*Axiom* 4*th. The dominion* is not acquired *by delivery*

unless there precede a title sufficient to transfer it, like those which we explained before; e. g., donation, sale, bequest.

"The contract of purchase and sale has the peculiar quality, that although it may be perfected by the delivery of the thing, nevertheless, the dominion is not transferred until the price is delivered; but if security, or pledge is given therefor, or the seller should give credit to the purchaser, the dominion of the thing sold will pass."

Alvarez's Institutes, vol. 2, p. 23–33; 63–66.

We might quote from many other authors to the same effect as the foregoing, but believe it wholly unnecessary, as the *principles* of Spanish and Mexican law contained in these extracts are beyond all question, and no law writer has stated them with greater clearness, or is of greater weight as an authority, than Alvarez.

It seems therefore plain beyond controversy, that when the Mexican Nation offered to its citizen the property, as well as possession of its Mines upon certain conditions, and the citizen performed these conditions, and the agent of the Nation, so constituted by its laws, ascertained and *adjudicated* the fact of such performance, and thereupon, in *its name*, and by its express authority, *delivered* to such citizen a "Mine" to which he had so acquired *the right*, that by these facts *the dominion* was transferred, through the joint effect of a perfect *title* followed by *delivery*.

The offer, and the performance of its onerous conditions, created a contract on the part of the Nation in favor of its citizen, which gave him as perfect a *right to* the thing offered, as when the Nation promised a reward of $25,000 "to each one

of the first four operators who should extract in one year from the Mines of the Republic, 2,000 quintals of liquid quicksilver," and this undertaking was performed.

This contract, executed on the part of the citizen, created his *title*, or *right to* the "Mine," and its *delivery* to him by the Nation, its *owner* and *lord*, vested in him with the *dominion*.

The "Mine" then became held, as the law which we have cited shows, by a much freer and more perfect title and tenure, and one subject to fewer burdens and conditions, than that by which the feudatory held his feud, or fee. The latter, nevertheless, was the *highest degree* of title in the *surface* and *soil* which the subject could acquire, in those early times when the Feudal System was in existence in Spain, as well as in most other European States, from which both species of real property received their *characteristic form* and *elements*. According to that System the *ultimate* and *allodial property* in the feud or fee, as well as in the "Mine," always remained in the *Sovereign*. The words used by the Sovereign in the concession of the feud, were the same as those used in granting the *mines—dedi et concessi*.

The very term *feud* signifies a *conditional* stipend or reward.

2 Black. Com. ch. 4, p. 45.

The *conditions* were numerous. Blackstone enumerates:—Military service, aids, reliefs, primer seizin, wardship, marriages, fines for alienation, and escheat.

To the grant of the "*Mine*," there were originally but *two*, the *payment* to the Crown of its proportion of the metal, and the *working* of it according to the laws; the *first* of which was abolished by the Decrees of the Cortes, and likewise by the Royal Decree of Ferdinand VII, of June 29th, 1821.

See Rockwell, p. 407.

The investiture of both was made by corporeal delivery. In the English law, this was called *livery of seizin;* in the Spanish and Mexican law, simply *delivery* (*entrega ó tradicion.*)

Under both systems of law, in early times, what was called *dominion* under the one, and *seizin* under the other, could be transferred and acquired without written title. A contract, or gift, executed by *livery of seizin*, or *corporeal delivery*, was sufficient to *change the ownership*.—This was so in regard to *land* as well as chattels.

The *estate*, therefore, which was held by a subject, was substantially the same, and of the same nature, in both species of property, in the Mine and in the grant of the surface. In both, it was descendible to the heirs of the owners without limitation, and would last *forever*, unless terminated by a breach of its *conditions*. *Denouncement* was the Spanish and Mexican mode of taking advantage of such breach in *both* cases, in regard to the grant of the surface, as well as in regard to the "*Mine*."

The *estate* of the Miner was, likewise, the same in *every part* of the *square* or *parallelogram* of ground, which constituted his "Mine." Although he abstracted therefrom only that portion of the soil which consisted of *ore* or *metal*, yet the balance thereof was equally necessary to him, for the placing of his machinery, the depositing of the earth taken from his excavations, and various other uses, and his right to the possession, use, and enjoyment of *the whole*, was the same, so long as his *estate* therein continued.

The owner of an estate in land for its *ordinary uses*, in like manner, derives his profits chiefly from the vegetation which

springs from its *surface*, and which *chemically*, as well as in contemplation of *law*, is a *part of the land;* nevertheless, his *estate* in the *whole body* of the soil, including the *rocks* as well as all *minerals* and *substances* of which it is composed, (except the *metals* and *ores*), is the *same* as in the *surface.*

That the dominion of a "Mine" was "*full*," according to the principles of Spanish and Mexican law, above recited, appears from the fact that it united in the "*same person*," both the "faculty of *using*," and that of "*disposing* of it."

This faculty is *expressly* given in the 5th, and other Titles, of said Ordinances of 1783, previously quoted.

"I grant them to my subjects in *property* (*propriedad*) and possession, in such manner that they may *sell* them, *exchange* them, *rent* them, *give* them, (*donarlas,*) leave them by *will*, *inheritance* or *legacy*, or in *any other manner alienate the right therein which belongs to them*, on the *same terms* on which they themselves *hold it.*"

Ordinances of 1783, Tit. 5, Art. 2.

Translated Halleck's Mining Laws, p. 222.

Not only so, but, as to Mines of *Quicksilver*, we have already seen in our review of Spanish and Mexican legislation, that the *Decree of the Spanish Cortes of January 11th*, 1811, *in express terms, repealed all dispositions whatsoever*, which, wholly or in part, "*opposed* the security of the *absolute and perpetual dominion* of the Miner," (*dominio absoluto y perpetuo del Minero,*) over his "Mine," and that this Decree was sent by the Regency to the Royal Tribunal General of Mining of Mexico, with the *official statement*, that, by virtue thereof, said "Mines" of Quicksilver will, in future, be enjoyed (*se beneficien*) "under the same rules and ordinances as those of gold, silver, and other metals, and that their possessors (*sus poseedores*) will preserve the *property and usufruct* thereof," (*su propriedad y usu-*

fructo.) and that "this measure (*providencia*) *secures inviolably* (*asegura de un modo inviolable*) *the property* (*la propriedad*) and *profits* (*utilidad*) of *such real estate* (*de tales fincas*)": and this Decree and Official communication were published in Mexico as "Sovereign Resolutions of the General and Extraordinary Cortes, and of the Supreme Council of the Regency, *conceding the full dominion and acquisition* (*el pleno dominio y adquisicion*) of the *Mines of Quicksilver*" of that country.

See Mexican "Ordenanzas de Mineria." Note to Art. 22 of Title VI. pp. 79 to 82.

Translated in Halleck's Mining Laws, p. 381–385.

That a "Mine" was a *corporeal*, and not an *incorporeal* thing, we have already seen, in our inquiry as to *what* it was under Mexican law.

This is made still more clear by considering for a moment the *act of delivery*.

The officer, accompanied by the Notary or witness, went upon the *ground* which was to constitute the "Mine" measured off its length of 200 varas, and its breadth of from 100 to 200, according to the dip of the vein, and, by *corporeal act*, made the *delivery*.

An *incorporeal* thing, we are told in the above recited law, *cannot* be delivered. It can only be *quasi-delivered*. That is, the *right*, in which alone it consists, can only be *exercised* and *permitted*. The *thing* itself is *intangible*, and *imperceptible to the senses*.

But a "Mine" is as perceptible to the senses as a house lot. Like the latter, it is a *piece of ground* of *definite extent* and *fixed boundaries*. It is this *piece of ground, square or oblong* in shape, measuring a certain number of *varas* in length and in width, with *boundaries* precisely fixed by *stakes* or *landmarks*, that the *Nation delivers* to its citizen, that he may extract therefrom its metalic wealth.

But it may be asked, supposing the vein of metal or ore to have been discovered in the *land of a private owner*, how can the Nation deliver that which it *does not own*. And still further, how could such *act* of delivery transfer the *dominion?*

The answer to these questions is not difficult, when the Spanish and Mexican Law on this subject is properly understood. We might almost leave the question, so to speak, to *answer itself*, relying solely upon the fact, that the Nation does promise to the discoverer of a vein of metal or ore, the above mentioned "space," or extent of *ground* upon such vein, to constitute the "Mine," *wherever discovered*, whether in the lands of *private persons*, of bodies corporate, or in those of the Nation, and that it is such fractional parcels of ground that it actually *delivers* to him under the *name* of a "Mine." The *Nation* would never *deliver* to a party, under the *solemn forms of law*, that which it had not the *right* to deliver, and of which it *could not transfer the dominion*. Nor would the Nation, under the like solemn forms, *measure* to a party, that extent of ground, in lands previously granted for ordinary uses to another, and undertake to make and deliver to him a *paper title thereto*, without the *lawful right* so to do, notwithstanding such previous grant of the *surface* and *soil*.

How then is this difficulty to be explained? Both Alvarez, whom we have quoted, and all other Spanish and Mexican law writers, concur in the statement, that *delivery* of a thing can only be made by its *owner* or *lord*. How then can the delivery of a "Mine," such as we have described it, be reconciled with the ownership of the *surface* and *soil* by *another?*

The answer, we think, will be found in the fact, that all "Mines," that is, consisting not only of a vein of metal or ore, but of such *extent of surface and soil as the law declared should be given to the Miner to constitute his "Mine,"* were, by the same law, *reserved to the Nation*. The *right*, there-

fore, to take from the grantee of the surface and soil, *on the discovery of a vein of metal or ore therein*, these small fractions of ground which inclosed such vein, and appropriate them to the great and *paramount public use* of Mining, was a right *established by law*, as well as *reserved* by the Nation, at the time such grants of the surface and soil were made. The *terms* of this appropriation, *fixed by law*, and to which the Miner *subjected himself* by receiving the grant and *possession* of the "Mine," were, that he should pay to its owner the value, for its ordinary uses, of the surface and soil which he received, and, likewise, any other damage which, by his mining operations, he might cause to him; and such value and damages might be recovered by judgment and execution. This appropriation affected the rights of the owner of the surface and soil, only in a manner, and to an extent, and upon terms, expressly *pre-declared* and *reserved*, and upon the careful and *judicial* ascertainment of the *facts* which authorized it. To such *extent*, and by the happening of such *event*, were all Spanish and Mexican grants of land for *ordinary purposes*, made *defeasible*. It was *a forced alienation*, so far as the surface proprietor was concerned, the right to make which the Nation had reserved to itself, because necessary to the development of its vast wealth and resources, and to the accomplishment of paramount *public ends*. The Nation, therefore, took these small parcels of ground, as things *belonging* (*pertenencias*) to the vein of metal or ore which had been discovered, and *granted* and *delivered* them to the *discoverer*, and to those who would develop and extract the *National treasure* which, at the time of such grant of the surface, remained unknown, and concealed therein.

The author of the Mexican compilation, entitled, "Ordenanzas de Tierras y Aguas," referring to Art. 14, Tit. 6, of the Ordinances of 1783, (Halleck's Mining Law, p. 228,) which we have previously quoted, says:

"Veins or Mines may be discovered or denounced, not only in common lands (*terminos comunes*), but also in *those belonging to an individual*, nevertheless the *discoverer or denouncer pays him for the land which he occupies on the surface*, and the damage which immediately follows to him, according to the estimate of experts named, and umpires, in case of disagreement."

Ordenanzas de Tierras y Aguas, p. 44, Chap. 2, Art. 48.

And, in a note subjoined to the foregoing, he adds:

"The *Cedula* of June 23d, 1803, published in Mexico by proclamation (*bando*) of May 14th, of the year following, has declared, comprehended in the disposition of this Article, [Art. 14, Tit. 6, of said Ordinances of 1783,] estates and lands which have been *entailed*, (*los fondos y tierras vinculadas*) and, *by consequence, subject like the common lands of Pueblos, and those of private ownership, to forced alienation*, (*a la enagenacion forzada*) *under the rules and upon the terms prescribed in the same.*"

And *Teodosio Lares*, from whom we have several times previously quoted, alluding to the same matter, in speaking of the nature of the "concession" of a "Mine," and its *effect* upon the rights of the owner of the *surface*, says:

"The concession (*la concesion*) of a Mine with respect to the owner of the surface (*proprietario de la superficie*) is an act of litigation (*un acto contencioso*,) because the owner of the surface (*dueño de la superficie*) is so of everything which is found in it, *so long as there is not made the declaration of ownership of the Mine by means of the concession. This* [i. e., concession] *constituting a new property* (*una nueva propriedad*) causes the *dismemberment* (*dismembracion*) of that i. e., of the (*property*) which the *owner of the soil* (*dueño del suelo*) *had* in his *surface* (*su superficie*), affects his right of property (*derecho de propriedad*), and the recourse to a judicial proceeding (*el recurso contencioso*) ought therefore to be adopted."

Lares' "Derecho Administrativo," p. 87.

We see from this extract, that the "constituting" of the "new property of the Mine" by the "concession" of it, "*dismembers*," that is, tears away a limb, or portion, of the property which the owners of the *surface* previously had, and that, inasmuch as this dismemberment ought not to take place without a *judicial investigation* and *ascertainment of the facts*, which, according to law, *authorize it*, that, therefore, the proceedings in such concession are devolved upon the *judicial* power, instead of the *administrative*. By the same power, also, would be immediately enforced, if *applied for*, the payment of the *value* of the surface for the uses to which its original owner had been devoting it.

But *what value* could a piece of hill land 200 varas square, or even 3,000 varas in all directions from the mouth of the Mine, as in the present instance, have for mere grazing purposes, in a country where *eleven leagues* might be obtained for the same purpose upon the mere asking for it? Only in case the land in which the metal was discovered were rendered valuable by cultivation, by being a garden, an orchard, or by having buildings or other valuable improvements thereon, would this *appraisement* ever be resorted to. The *value*, otherwise, would not pay for the *expediente*, or proceedings by which it was ascertained. The consequence would of course be, that, in most cases, no claim would ever be made.

Of course, until such claim were made, no proceedings of appraisement would take place, as one of the appraisers must be appointed by the claimant.

See Ordinances 1783. Tit. 6. Art. 14.

Translated Halleck's Mining Laws, page 228.

But it is perfectly clear, from the Ordinances of 1783, as well as from the Commentaries of the Spanish and Mexican law writers thereon, that the concession of "Mines," that is, of squares or parallelograms on the vein, embracing the number

of varas prescribed, to the discoverer and other Miners, and the *delivery* of such "Mines" to them, thereby transferring the *full dominion*, was never for a moment *suspended* or *delayed* on account of any such claim. Not one sentence in the whole of the Mining Ordinances, or in the Commentaries of Gamboa, can be found, to warrant or give color to any such inference.

The *reserved rights* of the Sovereign, or of the Nation, being judicially ascertained to *exist* in regard to the land in question, the new species of property to which the *laws* devoted such land, to wit, "Mines," was immediately constituted out of it by means of the *new title* created and delivered to the discoverer and other Miners, and the transfer of the dominion to them. From that moment, the *title* and *dominion* of the Miner *displaced* and *superseded* that of the previous owner of the *surface*.—The former's title to and dominion over his "Mine," was perfect, the latter's right to the value of his surface, equally so.

But this question, as to the rights of any prior grantee of the surface, is believed not to arise in the present case, which is one to determine merely the rights of the claimant of the "Mine" as against the *United States*. If the claimant's title was good as against the *Mexican Nation*, who granted him this "Mine," and put him in possession of it, it is equally good against the present defendant, the *United States*.

If our position in regard to what a "Mine" was under Mexican Laws be correct, it is plain, as we have before remarked, that it cannot be a *servitude (servidumbre)*, an *easement*, or any other kind of *incorporeal* property, as contended for by

opposing counsel, and supposed in the dissenting opinion of one member of the U. S. Land Commission.

There were, as we have seen, easements or servitudes, *annexed* to "Mines," such as rights to ways, waters, wood, pasturage, &c. But a servitude cannot be *annexed to a servitude*. It can only be annexed to *an estate in land*. No more can an easement be *annexed to an easement*. These *incorporeal* rights are always annexed to *corporeal* property.

A "Mine," likewise, could be leased, granted in *enfiteusis*, that is, *on quit-rent*, which could not be done of a *servitude* or *easement*.

It was subject to *all* the incidents of corporeal real property, could be given away, bought and sold without restriction, inherited, given as a marriage portion, hypothecated, made the subject of every species of contract, and sued for both in petitory and possessory actions.

Rockwell pp. 49, 219, 220, 251, 302, 392, *et passim*.

All the Spanish terms which are used to designate *land* when held for the more ordinary uses, are equally applied to "Mines," such as "*bienes raices*," "*fincas*," "*fundos*," &c.

See Mexican "Ordenanzas de Mineria," p. 80.

Galvan's Dec. y Ord., vol. 2, p. 192.

Lara's Dec. y Ord. del. Gob. Prov. 1841–2, No. 325, p. 374.

Id. 1842–3, No. 414, p. 17.

Id. 1842–3, No. 452, p. 60.

Halleck's Mining Laws, pp. 382, 404, 426, 429, 430, 431.

Gamboa in Rockw. p. 135, §28.

Ibid Rockw. p. 319, §22.

All the Mining Laws and Ordinances, as well as the Commentaries of Gamboa thereon, are full of directions and provisions in regard to the "*boundaries*" of Mines, how they are to be established, defined, and perpetuated.

Halleck's Mining Laws, pp. 13, 24, 25, 26, 27, 59, 140, 236.

Rockwell, pp. 130, 134, 137, 174, 176, 221, 222, 223, 225, 226, 227, 231, 236, 237, 252, 253, 254, 255, 256, 257, 261, 262, 263, 274, 276, &c.

But an *incorporeal* thing can, properly speaking, have no *boundaries*, being intangible and imperceptible to the senses.

It may be said, that the word *Mine* does not signify *land*, but only the *vein of metal or ore*. Strictly speaking, a Mine signifies only a pit or excavation in the earth. By *metonymy*, it is put for that which is taken out of such pit or excavation, that is, for the ore; and, by *synecdoche*, and that *general usage* which for convenience applies the name of the *most distinguishing part* of a thing for the whole thing, it was made to signify, and did in fact comprehend in Spanish and Mexican Law, not only the metal or ore, but likewise the *square* or *parallelogram of ground* in which such metal or ore was situate, which was granted as the *appurtenance* (*pertenencia*) thereof, and which in Spanish countries, as we have seen, was indispensable to *constitute* a "Mine."

This is no more than exists in almost numberless cases in the English Common Law. The word "*messuage*" is from the French word *maison*, meaning merely *a house;* yet, by the same figure of speech, this *principal* thing is made to include likewise the *orchard*, *garden*, and *curtilage*, which are enjoyed with it.

So the word "*grange*," which is likewise a French word signifying *a barn*, by *usage*, has come to mean and include also *stables* for horses, *styes* for cattle, and the *close* in which they are all situated, as well as an adjoining *curtilage*.

All these respective things, Lord Coke informs us, will pass under the several names above mentioned.

See 1 Co. Litt., 5*a*. 5*b*.

If a grant had been made to an English subject of a "*messuage*," or "*grange*," and on the transfer of the country to the United States, a claim for it were made before a Board constituted under a law like that which created the late California Land Commission, it surely could never be maintained, that such claim was not one for *land*, because the descriptive word under which such grant was made, did not *originally* signify land.

Passing now from the consideration of what a "Mine" was under the Mexican law, and of the rights held by its owner in the mineral and in the surface and soil which composed it, let us consider:

II. Were those rights, so acquired, impaired or changed, and, if so, to what extent, by the conquest of California by the United States, and its subsequent erection into a State and admission into the Union, and by its abolition of the Mexican laws and adoption of the English Common Law?

It seems to us, that, if we have succeeded in establishing the propositions which we have advanced in regard to what a "Mine" was under the Mexican laws, very little need be said under this head.

The claimant in the present case is understood to belong to the class of Mexicans "not established" in California at the date of the Treaty of Guadalupe Hidalgo, and which are spoken of in the last clause of the 8th Article of said Treaty.

In respect to these, the United States have pledged their faith that their "*property of every kind shall be inviolably respected,*" and that, both the owners at the date of said Treaty, and *their* heirs, and those who shall acquire such property from them, "shall enjoy with respect to it guaranties *equally ample as if the same belonged to Citizens of the United States.*"

The rights of the claimant, however, would be equally protected, did he belong to the other class of Mexicans, mentioned in the former part of said Article, who were "established" in California at the date of said Treaty.

The *conquest* of California by the United States did not, under the law of Nations, *impair private rights of property* therein. The *Treaty* expressly *guarantied* Mexicans against any such impairment or change.

The erection of California into a *State* and its admission into the Union, could, likewise, have had no effect whatever to *impair* or *change the rights of property* of Mexican citizens. The *State* of California becoming a party to the Federal compact, was as much bound by the Treaty of Guadalupe Hidalgo, as the Federal government itself.

Nor could the act of the California Legislature of April 13th, 1850, providing that "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution or Laws of the State of California, shall be the *rule of decision* in all the Courts of this State," and the subsequent act of April 22d, 1850, declaring, "That all laws now in force in this State,

except such as have been passed or adopted by the Legislature, are hereby repealed," have any effect to *impair* or *injuriously change* those rights.

To the latter Act there are annexed *express provisos*, that "no *rights* acquired, *contracts* made, or suits pending, shall be effected thereby," and "that such repeal shall not affect any Constitutional Laws or Acts of Congress, or any of the *stipulations contained in the Treaty of Peace between the United States and Mexico*, ratified at Queretaro the 30th day of May, 1848." But these provisos scarcely at all vary the *legal effect* of said Act, as it *could not*, under the Constitution of the United States and that of the State of California, affect any *rights* previously acquired, nor any of the stipulations of said Treaty.

See California Stats., 1850, pp. 219 and 342.

We have seen, that, nowithstanding, according to the principles of the Mexican law, a *Quicksilver Mine* belonged to the class of things called *Royalties (Regalias)*, nevertheless, it could be *acquired in full and absolute property* by a *citizen*.

Such, we have endeavored to show, was the *effect* of the *discovery*, *registry* and *judicial possession* of the Mine in question.

Under the Mexican Law, had it continued in force in this country, said Mine would have been *forfeited* by a breach of any of the *conditions* which the Ordinances of 1783 annexed to the claimant's *estate* therein, and to which that penalty was attached, and among others by *abandonment*, that is, a failure to work said "Mine" during *four* months out of the twelve in any one year. By similar abandonment, though perhaps a longer period of time would ordinarily be requisite, a grant of land for agricultural or grazing purposes was, under the Mexican law, likewise *forfeited*. Both species of property, by such forfeiture, became subject to *denouncement*, and to be regranted to another.

But this law of *forfeiture* and *denouncement*, and the policy upon which it was founded, no longer exist in California, nor have, since the 22d day of April, 1850.

Both the "Mine" and the grant for agricultural or grazing purposes are now held *free from those conditions*. This is the effect of the repeal of the said Mexican laws, and the introduction of the principles of the English Common Law.

By the principles of that Law, every owner of real property, of *whatever kind*, is left *perfectly free* to consult his own interest or pleasure, not only as to the *manner* in which he shall use it, but as to *occupying or using it at all*.

By the principles of the same Law, also, it cannot for a moment be doubted, that 3,000 *varas in extent of ground*, from a given point, granted to a person for the purpose of extracting *Quicksilver* therefrom, is as much "*land*," as though granted for a *house-lot* or a *garden*. The Common Law knows no difference in the *nature* or *tenure* of real property, arising out of the *uses* to which it may be devoted, or the *kind* of profits which may be derived from it.

The difference between the latter Law and that of Spain and Mexico on the subject of *Mines*, was a very wide one.

This difference arose, doubtless, partly from the much greater relative importance of Mining in the two latter countries than in Great Britain, as a branch of productive industry and National wealth, and partly, from the adoption of a different rule in regard to the *nature* and *fundamental ownership* of all Mines *other* than those of gold and silver. Mines of the *two latter* metals were the only ones which were Royalties (*Regalias*) according to the Common Law.

Queen vs. Earl of Northumberland, 1 Plow. Rep. 310:

7 Com. Dig. *Waife* (H. 1):

1 Black. Com. 295 :
Bainbridge on Mines, pp. 46—54 :
Rockwell, pp. 514—519 :

All other Mines of whatever kind or description, were *merely land*. At the same time, such a thing as a Mine of gold or silver *worth working*, has scarcely been known in Great Britain within the period of authentic history. Those metals exist only to a very small extent, and in combination with the ores of iron, lead, copper and tin.

The whole system, therefore, of *pertenencias*, or the grant of specific portions of the *surface* and *soil* to "*constitute* Mines," is wholly unknown to the English Common Law. By that law, the *grant*, or *lease* of a *Mine merely*, vests in the Miner no *estate* in any defined portion of the *surface*, but only the *incidental* right to use *so much* thereof as is "*strictly necessary* and *reasonable*" for the *extraction* and *removal* of the mineral, but not, as under the Spanish and Mexican law, for its smelting and reduction.

Bainbridge on Mines, pp. 58, 59, 84, 85, 86.

This difference between the law of England and that of *Civil Law countries* in regard to *what constituted a "Mine,"* is alluded to by Lord Campbell in his opinion in the case of *Humphries vs. Brogden*, in discussing the right of the owner of the *surface* to *support* from the subjacent mineral strata, in the following language:

"We have attempted, *without success*, to obtain from the codes and jurists of other nations, information and assistance respecting the rights and obligations of persons to whom *sections of the soil divided horizontally, belong* as *separate properties*.

This penury, where the subject of *servitudes* is so copiously and discriminately treated, probably proceeds from the *subdivision of the surface of land, and the minerals under it, into separate holdings*, being *peculiar to England. Had such subdivisions been known in countries under the jurisdiction of the Roman Civil Law*, its incidental rights and duties must have been exactly defined," &c.

Humphries vs. Brogden, 1 Eng. Law and Eq. Rep. p. 249.

But notwithstanding this peculiarity of the Common Law, nevertheless, according to that law, the grant of a *coal, tin, copper, lead*, or other like *Mine*, though carrying only the *strata* or *vein of ore*, containing such Mineral or Metal, and the *easements* in the surface and soil *necessary* to its extraction and removal, is still the grant of an "*estate in fee simple in land*," such *strata* or *vein* being held to be as much "land" itself, as the *surface* or the *remaining portions* of the body of the soil.

1 Co. Litt. 4*a* 4*b*:
Bainbridge on Mines, pp. 3, 55, 56, 124, 141, 170:
Rockwell, pp. 530, 536, 537, 565, 580:
Stoughton vs. Leigh, 1 Taunt. 408—412.
Earl of Cardigan vs. Armitage, 2 Barn. & Cress. 197:
Wilkinson vs. Proud, 11 Mees. & Wels., 33, 39, 40:
Boyce vs. Green, Batty's (Irish) Rep. 608:
Humphries vs. Brogden, 1 Eng. Law & Eq. Rep. 241:

Upon the same principle, it is held, that under the description of "land" in a Deed or Act of Parliament, such *Mines* will pass; which shows that (without including as they do under Mexican law, any portion of the surface), they are still "land."

2 Black. Com. pp. 18, 19:
1 Co. Litt. 4*a*.:
4 Com. Dig. *Grant* (E. 3):
Townley vs. Gibson, 2 Term R. 701.

So, as in the Mexican law, under the *name* of a "Mine" or "*feud of lead*" (*fodina plumbi*), the *land itself*, in which such Mine exists, will pass, provided *livery of seizin* thereof be given.

1. Co. Litt. 6*a*.
Shep. Touch. p. 96.
4 Com. Dig. *Grant* (E. 5.
Bainbridge on Mines, p. 141.
Rockwell, p. 536.

A "*Mine*," likewise, according to said Common Law, so different ordinarily, as we have seen, from what it was under the Mexican Law, was, nevertheless, always held to be *corporeal* real property, and to pass by *livery of seizin*, and not by *grant* merely, as was the case with *incorporeal* things:

Rockwell, pp. 536, 537.
Bainbridge on Mines, pp. 141, 142, 143, 211.
2 Black. Com. pp. 310, 311, 315, 317.

Also, an action of ejectment, an assize, a common recovery, trespass, an action for use and occupation, and almost all the other legal remedies applicable to "land," could be maintained likewise with respect to a "*Mine*," none of which would lie for an *incorporeal* thing:

Adams on Eject. pp. 18, 20:
1 Co. Litt. 6 A.
Comyn *vs.* Kyneto Cro. Jac. 150.
Jones *vs.* Maunsell, 1 Doug. 304, 305.
Bul. N. P. p. 99.
Bainbridge on Mines, p. 141.
Rockwell, p. 536, 565, 580, 582, 588, 594.
Doe *vs.* Wood, 2 Barn. & Ald. 737.
Doe *vs.* Bancks, 4 Barn. & Ald. 401.
Rich *vs.* Johnson, 2 Stra. 1142.
Sayer *vs.* Pierce, 1 Ves. Sr. 232.

So, under the Common Law, Mines, although including *no part of the surface*, but forming a *distinct and separate estate* and *inheritance* therefrom, were, nevertheless, subject to be leased on rent with all the incidents of leases of other land, and, likewise, to be partitioned among co-parceners or tenants in common, neither of which could be done in reference to things *incorporeal*.

Co.. Lit, 47, *a*, 144, *a*.

Rockwell, pp. 543, 548.

Bainbridge on Mines, pp. 70, 129, 163, 195—246.

Doe *vs.* Bancks, 4 Barn. & Ald. 401.

So, the law of *fixtures* applies to Mines, which had no application to things *incorporeal*.

Bainbridge on Mines, p. 171—177.

So, *incorporeal* rights, such as those of ways, waters, and other *easements in the land of others*, may, by grant, or prescription, be annexed to a "*Mine*" in like manner as to other *corporeal* real property, and, by a grant of such "Mine," may pass as its *appurtenances*.

Bainbridge on Mines, pp. 84, 85, 87, 97, 101, 104, 106 115, 116, 199.

Rockwell, pp. 554, 555, 556.

Earl of Cardigan *vs.* Armitage, 2 Barn. & Cress. 197.

But *Mines* themselves could not be acquired by prescription, any more than by grant, because by the Common Law only *incorporeal rights* could be so acquired. The right of working mines in another man's land, arising from a presumed or actual *license*, might be so acquired, because this

was an *incorporeal right*, and did not carry either an *estate* in, or the *legal possession* of the Mine.

Wilkinson *vs.* Proud, 11 Mees. & Wels., p. 33.
Bainbridge on Mines, pp. 5, 129.
Rockwell, pp. 532, 548, 565, 670.
Doe *vs.* Wood, 2 Barn. & Ald., 737–742.

As we said at the commencement of this Brief, it seems to us plain that the Jurisdiction of the Land Commission and of this Court, extends to every estate interest or right in land, of every kind, nature, and description, which was private "*property*" under the Mexican dominion; and, *such as the Claimant's right then was* in the land called the "New Almaden Mine," the Court ought now to *confirm* to him. This, we think, has been held by the Supreme Court of the United States, in construing laws similar to that under which this Court is now acting; and such, we also think, are the plain requirements of the Treaty of Guadalupe Hidalgo.

Delassus vs. United States 9 Pet. 133–135.

It is urged, that in the case of *Fremont vs. the United States*, the Supreme Court *expressly decided* this question of Jurisdiction, so far, at least as relates to the Mine, and adversely to the present Claimant. We think the Court, in that case, made no such decision; and that, without travelling wholly out of the record, it *could not* have so adjudicated.

We affirm, that in *principle*, that decision *sustains* our position. What does it decide? That the jurisdiction of that Court, and, of course, of all subordinate tribunals, under the Act of Congress of March 3d, 1851, is limited and confined solely to deciding upon the *validity of claims to lands*, as between the *Claimant* and the *United States;* and

that they have, therefore, *nothing to do* with controversies arising between the Claimant and third persons as to the *different interests* in said land claimed by each of them; or between the Claimant and the municipal "Sovereignty" of the country, to wit: The State of California, as to the latter's "rights" to the *Mines* of gold and silver, if any such existed therein, but that all these "are questions which must be decided in *another form of proceeding* and are not subjected to the jurisdiction of the Commissioners, or the Court, by the Act of 1851:"

17 How. Rep. 565.

It seems to us, that the meaning of the Court, when the facts presented in that case are properly considered, is scarcely capable of being misunderstood.

The Court decides the only matter that was *relevant* to the case before them, to wit: that the discovery of gold or silver in the land granted to Fremont, subsequent to his grant, had not *destroyed his title* to the land granted, and was therefore no reason why it should not be confirmed to him; and, as a reason for going no farther in their decision, they say, that "the rights of the Sovereignty" to these metals "are questions which must be decided in another form of proceeding," &c.

Even were we mistaken in the position that our title includes the entire *surface* and *soil* of the "3000 varas in all directions from the mouth of the Mine," as well as the *quicksilver ore*, therein, still, can it be seriously questioned that a *vein of cinnabar* was, at Common Law, anything more or less than "land?"

Was it not as much "land" as a vein of lead, tin, or copper ore?

We are, therefore, claiming before this Court nothing but "land" in the strict Common Law sense, and this,

equally, whether our estate and title extends to the *whole body* of the soil, or only to the *vein of cinnabar* within it.

In the case of *Delassus vs. the United States*, the Supreme Court expressly *confirmed* to the claimant a "*lead mine*," although the jurisdiction given by the Act of Congress under which the confirmation was made, was, as in the present case, only over claims to "land." That confirmation necessarily decided that a "lead mine" was "land," and that, to use the language of the Court, as the Act of Congress on which this case depends contains no *reservation* of the "*lead mines*," that therefore they were included in its jurisdiction. In other words, the term "land" included "lead mines," and it required an *express reservation* in the Act of Congress to exclude them. If, therefore, the Court, under the description of "land," had jurisdiction of a "lead mine," why not equally of a "Quicksilver Mine?"

As, therefore, this "Mine" is, by the Common Law, *land* merely, the title to it, if not vested in a private person, has become vested in United States. The claimant, therefore, in order that his title might not be clouded and placed in jeopardy, and, he subjected to ruinous litigation by the creation of an adverse title emanating from the United States, has seen fit to present and prosecute the present claim. The same necessity for its prosecution, in order to separate it from the public domain, and prevent its virtual confiscation and grant by the Government to another person, exists in this case, as in that of any other land claim.

In conclusion, we respectfully submit, that we have established the following propositions:

1. That a "Mine," under the Mexican dominion, was a specific piece of "land," of definite extent and boundaries, and included, as the word land does at Common Law, not only the minerals within the earth, but likewise its *surface*, and everything above and below it:

2. That any number of such "Mines," in the discretion of the Supreme Government of Mexico, might, in the years 1845 and 1846, upon the recommendation of the *Junta de Fomento y Administrativa* of Mining, be granted to an individual or copartnership, by way of assistance and encouragement to some important enterprise in Mining:

3. That the *right* to, and *dominion* in, such "Mine," acquired by discovery, registry, and judicial possession, was a *perfect legal title* and *seizin in fact* of the same, combining, in the language of the Mexican and Clvil Law, a *jus ad rem*, and a *jus in re:*

4. That although the *estate* of the Miner in his "Mine" was, in early times, *defeasible*, and subject to *forfeiture* by the non-payment to the Crown of the proportion of metal reserved to it, and, likewise, by a failure to work said "Mine" according to the Mining

Ordinances, making such estate what, at Common Law, would be called a *conditional fee*, yet that, by the Decree of the Cortes of Spain and the subsequent one of the Mexican Government, the *first* of these conditions was removed as early as the years 1821 and 1822, and that, by the abolition of the Mexican laws and the adoption of the English Common Law in California in April, 1850, the *second* of said conditions, which was founded merely in *public policy*, was likewise removed, so that, since said latter date, such estate has been held, like all other *estates in fee* in land in California, subject only to the rules and principles of the Common Law:

5. That the rights held by Claimant to and in said "New Almaden Mine," at the time of the conquest of California by the United States in the year 1846, were not in any manner *impaired* by such conquest, nor by the subsequent erection of California into a State and its admission into the Federal Union, nor by its abolition of the Mexican laws and adoption of the English Common Law, but, on the contrary, were, by the last mentioned event, as above stated, rendered wholly *free from conditions:*

6. That the "*property*" of said "Mine," acquired by Claimant in conformity with the Mining Ordinances

of 1783, and made *absolute and perpetual* by the Decree of the Spanish Cortes in 1811, and freed from all *conditions* except that of working it, by the Decree of the Mexican Government, was expressly *guaranteed* to said Claimant, by the provisions of the Treaty of Guadalupe Hidalgo :

7. That, if we are right in our position, that under the Mexican dominion a "Mine" was a parcel of ground of definite extent and boundaries, including not only the mineral therein but likewise its surface and soil, then the Jurisdiction of this Court is unquestionable :

8. That even if we are mistaken on this point, and the Court should arrive at the conclusion, that a "Mine" under the Mexican Mining Laws was the same in substance as under the English Common Law, still it was and is, by the latter law, "land," as is shown by innumerable judicial decisions, and proved by its possession of all the qualities, attributes, and incidents of other *corporeal* real property :

9. That the Supreme Court of the United States has not decided this point of Jurisdiction against us in the Fremont case, but has, in the case of *Delassus vs. The United States, in principle*, decided it in our favor.

HALL McALLISTER,
Of Counsel for Claimant.

IN THE

Supreme Court of the United States.

UNITED STATES

vs.

ANDRES CASTILLERO.

BRIEF, STATEMENT OF FACTS AND POINTS,

For Claimant.

ARCHIBALD C. PEACHY,
CHARLES O'CONOR,
REVERDY JOHNSON,
Of Counsel.

NEW YORK:
JOHN F. TROW, PRINTER, 50 GREENE STREET.
1863.

Supreme Court of the United States.

THE UNITED STATES
vs.
ANDRES CASTILLERO.

ANDRES CASTILLERO
vs.
THE UNITED STATES.

BRIEF, ABSTRACT, and POINTS for Claimant, on appeal and cross-appeal.

The United States and the claimant respectively appeal from a judgment of the District Court under the "*Act to ascertain and settle the private Land Claims in the State of California*," passed March 3, 1851.—*9th Statutes at large, p.* 631.

STATE OF THE CASE.

On September 30, 1852, Andres Castillero, a citizen of Mexico, by Halleck, Peachy & Billings, his attorneys, presented his claim to the Board of Commissioners appointed under said Act.

His Petition set forth, that having discovered a mine of cinnabar in 1845, in San José, now Santa

Clara County, in said State of California, he denounced it before the proper local officer, *i. e.*, Alcalde *Antonio Maria Pico;* and, on December 30 of the same year, "received * * in due form the juridical possession of said mine, and land to the extent of 3000 varas in all directions." That he and his associates holding under him, and their agents, had ever since held uninterrupted possession and occupation accordingly, and had worked said mine, expending thereon, between Dec., 1845, and May 1, 1852, the sum of $978,114\frac{11}{100}$.

Also, that on May 14, 1846, soon after his discovery, "the *Junta de Fomento y Administrativa de Mineria*, the highest mining tribunal of Mexico, recommended to the Supreme Executive Power of the Republic" not "only that the mining possession of 3,000 varas in all directions from the mouth of the mine, be confirmed; but that the Executive should grant in fee to the said Castillero * * two square leagues of land on the surface of his mining possession," and that such confirmation and grant were made accordingly.

That, on May 23d, 1846, the Minister of Relations, &c., delivered to Castillero the proper order to the Governor of California stating such grant, and directing him "to put said Castillero in possession of the said two square leagues so granted."

That the war, then commencing, interrupted Castillero's journey to California, and prevented such formal possession; but that, in 1847 or '8, he had caused the land to be surveyed, and the boundaries to be marked out.

He insisted that, independently of the grant, he had acquired under the laws of Mexico, by such discovery, working and denouncement, a perfect right to the minerals, and to the use of the land for mining pur-

poses. To his petition he annexed copies of the documents shewing his said titles.

See Petition, pp. 5 *to* 8.
See Documents before Alcalde Pico, *Exh. R., No.* 1, *pp.* 257–259.
Translations thereof, pp. 795, 796.
See Documents of confirmation, pp. 34–48.
Translations thereof, pp. 49–61.
See Grant of 2 *sq. leagues, p.* 65. 2200.
Translation thereof, p. 67.

On January 8, 1856, the Commissioners, rejecting the residue, confirmed the claim as "to the mine * together with the right of enjoying the privileges, as mine-owner under the Mexican law, within the space, as *pertenencia*, of 3,000 varas in all directions from the mouth of the said mine." (*p.* 129.)

Record before the Land Com'rs. (*pp.* 3–130.)

See an exhibit of that record in chronological order. (*pp.* 3125–3167.)

Castillero appealed to the District Court, March 26, 1856. (*See Petition of Appeal, p.* 140.)

The United States appealed, April 15, 1856. (*See United States Petition of Appeal, p.* 132; *Castillero's Answer thereto, p.* 142.)

Reversing the decision of the Commissioners and rejecting all other parts of the claim, the District Court, January 18, 1861, adjudged "the claim and title * * to the mine" to be "a good and valid claim and title; and that said Andres Castillero and his assigns are the owners thereof, and of all the ores and minerals * * therein, in fee simple. * * That said mine is a piece of land embracing a superficial area, measured on a horizontal plane, equivalent to seven *pertenencias*, each pertenencia being a solid, of a

rectangular base 200 Castilian varas long, of the width established by the *Ordenanzas de Mineria* of 1783, and in depth extending, from and including the surface, down to the centre of the earth; said *pertenencias* to be located in such manner as the said Andres Castillero, or his assigns, may select," but to be contiguous and to include the mouth of the mine. (*p.* 3581.)

Castillero appealed to this Court, January 19, 1861. (*p.* 3583.) The United States also appealed to this Court, January 25, 1861. (*p.* 3584.)

See *opinion* of Land Commissioners by Mr. Com'r. FELCH, *pp.* 81–104.
See *opinion* of Mr. Com'r. THOMPSON, *dissenting*, *pp.* 105–128.
See *opinion* of Judge MCALLISTER, *pp.* 3359–3426.
See *opinion* of Judge HOFFMAN, *pp.* 3427–3581.

Preliminary Observations.

In this Brief, the contents of the Record are arranged in four principal divisions:

THE FIRST DIVISION (from p. 9 to p. 36), contains *all* the material facts, with a reference to the questions of law to which they gave rise in the tribunals below.

No really relevant matter is contained in any of the other three divisions of this Brief. They are essentially surplusage.

THE SECOND DIVISION (from p. 36 to p. 137), contains the evidence *pro* and *con*, touching an attempt to impeach the *genuineness* of Castillero's title.

This might be deemed surplusage, for the reason that, in support of the impeachment, nothing was

brought forward which can cause a moment's deliberation or reflection. Nor will there be room for any argument upon it, after a full and clear statement of the evidence.

THE THIRD DIVISION (from p. 137 to p. 169), contains a statement of affirmative proofs in support of the facts asserted by the claimant, and set forth in the First Division of this Brief. This evidence was accumulated to an excess, and iterated to a degree that can scarcely be justified; especially as there was nothing to be repelled, save the mere suggestions of counsel who maintained the negative. Those suggestions were unsupported by any proof, and they are in themselves destitute of probability.

THE FOURTH DIVISION (from p. 169 to p. 183), exhibits, in order, a set of incidental attempts to gainsay particular facts asserted by the claimant.

It would be conformable with natural order to insert these in their appropriate places throughout the preceding Divisions. But digressions tend to impair the clearness of a narrative. And, inasmuch as the details set forth in the Second and Third Divisions are extremely uninteresting, it was thought desirable to avoid, as much as possible, any interruption of their continuity.

The object of making these divisions is, that after ascertaining by an examination the entire immateriality of all that part of the Record which, in a condensed form, is transferred to the Second, Third, and Fourth Divisions of this Brief, attention may, thenceforth, be confined to the truly relevant portions of the Record, *all* of which, as before stated, are placed between pp. 9 and 36 of this Brief.

Some terms and phrases used in this Brief.

Andres Castillero, the original discoverer and owner of the property now in controversy, soon parted with portions of his interest. Independently of these sales of the property itself, a distinct interest was introduced at an early period: a contract called an *avio* was entered into, between him and his co-owners on the one part, and a company of persons called *aviadores* on the other, by which the latter undertook to supply and work the mine for 16 years on shares. This contract is sometimes called *habilitacion;* the undertakers are then called *habilitadores.*

As is quite usual, the claim in this case was filed in the name of Andres Castillero alone, without bringing in, as a nominal litigant, any other person. (*p.* 366, Q. 209, 210, 211.)

United States v. Sutter, 21 *How.* 182, *and cases cited.*

In the various contests and litigations referred to, we shall generally designate the title now asserted as the *Castillero title.* We shall frequently designate the party or parties who represent that title, or act in its behalf, as *Castillero*, or *Castillero's grantees.*

The judicial Act to perfect a title as discoverer of a new mine, under the mining laws of Mexico, is properly called a *registry;* the judicial Act for acquiring title to an old mine, on the ground that its owner has abandoned it, or neglected to work it continuously, and thereby forfeited his rights, is commonly called a *denouncement.* (*pp.* 2682, 2683.) We shall invariably use the latter form of expression: it is convenient, and sufficiently accurate for all the purposes of this case.

Importance of Castillero's Discovery.

The *Cinnabar* of commerce is an artificial sulphuret of mercury, formed in the process of manufacturing vermilion. Native cinnabar is the common ore of quicksilver. *Ure's Dictionary, Title "Vermilion:"* This metal is "sparingly distributed in nature, and its mines are very rare." *Ure's Dictionary, Title "Mercury:"* The Royal quicksilver mines of Almaden, in Spain, have been worked for 25 centuries; and at the time of Castillero's discovery they were the most important in th e world.

5 *New Am. Cycl., Titles "Cinnabar," "Almaden." Ure's Dict'y., "Mercury."*
1 *M'Culloch's Geog. Dict., "Almaden."*

Quicksilver is an article of prime utility, and is in extensive use for other purposes; but its chief consumption results from its employment as an amalgam with gold and silver, in order to separate these metals from the substances with which they are found united in nature. Vast quantities are thus employed (*p.* 1749); pound for pound of quicksilver being usually consumed in thus extricating the precious metals. When the ores of gold and silver are poor, the consumption of quicksilver is of course proportionably increased (*p.* 1749).

The gold and silver mines of Mexico were regarded as constituting, essentially, the wealth of the Republic (*p.* 1267, Q. 331—*pp.* 1748, 1749); but their ores were poor (*p.* 1749). Consequently there was a great demand in that country for quicksilver.—The *Junta de Fomento*, or National Board for the Encouragement of Mining, sustained by special taxes and imposts conceded to it for that purpose, and aided by a variety of other legislative enactments, was continually employed

in strenuous efforts to obtain the needed supply. They sent experts on commissions of exploration into all the departments, except California, whose mineral wealth was unknown, and which was regarded as "the end of the world" (*p.* 2435, Q. 189). Large rewards were offered for discovery and to stimulate production (*p.* 3185); but these efforts were not very successful, and the *Junta* was obliged to obtain loans and to negotiate with the Royal Spanish monopoly, or its grantees, for the quicksilver needed to uphold mining industry within the Republic. In and prior to 1845, three-fourths of the requisite annual supply were obtained from this source.

Testimony of Bassoco, Member of the Junta, pp. 1214–1329. And especially *pp.* 1218, 1219, 1243, 1267, 1268.

Testimony of Professor Balcarcel, pp. 1872, 1918.

Report of the Junta to the Government. Exhibit Bassoco No. 4, *pp.* 1712–1754. And especially *pp.* 1748–1750.

Report of the Junta to the Government for 1843–'4, *printed in* 1845, *Exhibit Bassoco No.* 13, *pp.* 1819–1864. And especially *pp.* 1820, 1825, 1828, 1831, 1833; and also the list of explorations in each distinct department, shewing that California was not one of them. To this point see *p.* 1872.

Professor Del Castillo's testimony, p. 1981. And his SUMMARY of the explorations for QUICKSILVER in the various departments (California as usual omitted) in the year 1844, *printed in* 1845, *pp.* 2051–2090.

Actas, or Minutes, of the *Junta de Fomento, &c.*,
Exhibit Bassoco No. 6, *pp.* 1427–1594;
Translation thereof, pp. 3171–3355.

And especially see *pp.* 3183, 3185, 3187, 3218–3247, 3250, 3274, 3275, 3277.

Contrary to the fact in most of the California Land Cases, the property here in question did not derive its value from the acquisition of that country by the United States. The mine was discovered and worked before the commencement of hostilities; and its development had been more than two years in very active progress, when, in January, 1848, the first discovery of gold occured.

Soulé, Gihon & Nisbet's Annals of St. Francisco, p. 130; *testimony of J. C. Fremont, p.* 2680. See J. A. Forbes' letter of January 13, 1849. *p.* 3052.

FIRST DIVISION.

This Division terminates at p. 36. As before stated (p. 4), it will be found to contain *all.* the material facts and a summary of the points of law involved in the case.

Grounds of Claim.

In the exhibition of proofs, as in the petition, Castillero's claim has, throughout, been placed upon four distinct grounds: *First*, discovery; *secondly*, the registry or denouncement in virtue of which the Alcalde made his Act of Possession; *thirdly*, a ratification by the Supreme Government; *fourthly*, a colonization grant of two square leagues, containing the mine within its limits.

The fact of Castillero's Discovery

Is only disputed in argument. The evidence is all one way: it is unimpeached and uncontradicted. Its recital, under this division of the Brief, must be tedious and uninteresting. It is, nevertheless, stated some-

what at large. But this is done merely as a matter of form.

The mine is in the present county of Santa Clara, near the Mission Village of that name. It is situated in a spur of the *Sierra Azul*, or Blue Mountains, 1,500 to 1,700 feet above the level of the sea (p. 2654).

The mineral was early observed by the Indians, and used by them for paint (pp. 413, 633–634, 458).

As early as 1824, Antonio Suñol, and one —— Chaboya, imagining that the mineral was silver, attempted to work it (p. 413). Hence it was first called Chaboya's mine (pp. 632, 2613, 611, Q. 63–64). Some thought it was gold and others that it was silver; but no one thought of its being quicksilver (pp. 421, 631, 2613, 458–2669).

Castillero whenever alluded to in the testimony or documents, is spoken of in very favorable terms (pp. 2492, 2495, 2497, 2406).

And see especially the sarcastic sneers of J. A. Forbes, designating him "that eccentric individual" (p. 403). He was a captain of cavalry in the Mexican army, a surgeon and chemist (p. 2613).

He had visited the Californias in 1834, in public employment, as secretary to General Chico (p. 2612). Again, in the autumn of 1845, he was sent as a commissioner from the Mexican Government, to Sutter's Fort to negotiate with Sutter for its purchase.

The party from Monterey thither were Castillero, General José Castro, four other gentlemen, and fifteen or twenty soldiers (p. 2613). When near Santa Clara, General Castro mentioned this mine. Castillero made some examinations, and, after leaving Sutter's Fort, he returned to Santa Clara, pursued his investigations, and discovered the quicksilver (p. 2613).

Teodoro Robles, who afterward became his part-

ner, told him of this mine, saying it was a silver mine (p. 415. *See* pp. 421, 2613).

Castillero was the first to discover that it was a quicksilver mine (pp. 413, 631, 635, 1103, 1105, 1106, 1108, Q. 1. p. 2634, 458. p. 643, *questions* 75 to 80).

In November, 1845, he instituted proceedings before the Alcalde of San José (Pico), and obtained juridical possession. By an instrument dated November 2, 1846, he formed a partnership with José Castro, S. & T. Robles, and Padre Real to work the mine (pp. 2614, 2752 to 2754.)

In November and December, 1845, he was considerably at the mine, obtained assistance, and experimented in the reduction of the ore by various somewhat rude contrivances, first with gunbarrels and then with whaler's trypots, over a furnace, and a trough of cold water for condensation.

In November or December, 1845, or January, 1846, Castillero employed *Wm. G. Chard*—a native of Columbia Co., N. Y., as superintendent (p. 1072, Q. 25. *See* pp. 1081, Q. 22, 23, 24); Chard built a workhouse, erected furnaces and extracted considerable quantities of quicksilver. He was aided in his labors by one white man, a blacksmith called Old Billy, and ten or twelve Indians (p. 1070).

This superintendent first worked under Castillero himself, then under Padre Real, and finally under J. A. Forbes (p. 1071). He finally left the superintendency to J. A. Forbes, in August, 1846 (pp. 1071 to 1073, 1083. *See* p. 1086).

J. A. Forbes' letter to A. Forbes, dated Sept. 22, 1846, p. 540.

Testimony of J. A. Forbes, p. 447.

The general fact that at this very time, i. e., in the autumn of 1845, Castillero discovered the quicksilver, developed it fully, and *denounced* the mine, is superabundantly proven.

As to the direct fact of discovery, see:

Testimony of Antonio Suñol, pp. 413–415.
" *Alcalde Pico*, pp. 631–635.
" *Jacob P. Leese*, pp. 1102–1109.
" *Gen. José Castro*, pp. 2613–2614.

As to the actual working of the mine by Castillero, and his actual or reputed denouncement at this very time, i. e., the autumn of 1845:

Testimony of Jose Noriega, pp. 23, 24.
" *Antonio Suñol*, pp. 27, 413.
" *Wm. G. Chard*, pp. 1068–1083.
" *Peter Davidson*, p. 1086.
" *Gen. John C. Fremont*, pp. 2678–2683.

As to the public notoriety or repute in California of Castillero's discovery and denouncement of this mine at this very time, i. e., in 1845 and the spring of 1846:

Testimony of Gen. Fremont, p. 2681.
" *Peter Davidson*, p. 1084.
" *John Bidwell*, p. 2643, *Q.* 9.
" *Wm. F. Swasey*, p. 2662, *Q.* 20, 21, 22.
" *Augustin Olvera*, p. 2610, *Q.* 10.
" *Pedro Sainsevain*, p. 2810.
" *John M. Murphy*, p. 745.
" *Gov. Pio Pico*, pp. 2531–2552.
" *Gen. Mariano G. Vallejo*, pp. 2597–2605.
" *Jose M. Covarrubias*, p. 2608.
" *James Alexander Forbes*, p. 459.

These facts were of public notoriety in 1846 in other places, far distant from California.

On 30th January, 1846, *J. A. Forbes, in a letter from San Francisco to Eustace Barron, at Tepic, in Mexico* (p. 540), writes as follows:

"D. Andres Castillero, a sort of commissioner from the Mexican Government to this Department, is now working a quicksilver mine near the mission of Sta. Clara, which has yielded 40 per cent. upon the assay of mineral employed."

On May 11, 1846, p. 382, *A. Forbes, of Tepic, wrote to J.A. Forbes, repeating a prior request,*

"To procure * * correct information * * respecting the quicksilver mine or mines, lately said to be discovered in California, one of which you mention as being worked by Mr. Castillero. If quicksilver mines of value are discovered, it would be of immense interest for Mexico, as, owing to the scarcity and high price of this article, the poorer silver mines of Mexico cannot be worked."

Thomas O. Larkin, American consul at Monterey, having departed this life, his consular book of official letters was produced.

The following copies were found in it:

Letter to U. S. Minister at Mexico, dated April 3, 1846. Mr. Larkin says:

"At the town of San José, eighty miles from Monterey, Don Andres Castillero has discovered a quicksilver mine. The ore produces from 15 to 60 per cent. I have seen him, from an old gun-barrel, run out about 30 per cent. in pure quicksilver. This must be a great advantage to California." (*p.* 2668.)

In a letter to Capt. J. B. Montgomery, of the U. S. ship Portsmouth, dated May 2, 1846, he repeats this statement more at large, describing the process of extracting the quicksilver, which he had "twice seen" (*pp.* 2676, 2669).

On May 4, 1846, Larkin addressed to the Department of State a letter, containing, amongst a variety of similar information, the following matter (pp. 2670, 2671).

"Five or six miles from the town of San José, and near the mission of Santa Clara, there are mountains with veins of quicksilver ore, discovered by Don Andres Castillero (of Mexico) in 1845, which the undersigned has twice seen produce 20 per cent. of pure quicksilver, by simply putting the pounded rock into an old gun-barrel, one end placed in the fire and the other end in a pot of water for the vapor to fall into, which immediately becomes condensed. The metal was then strained through a silk handkerchief. The red ore produces far better than the yellow. There appears no end to the production of the metal from these mountains. Working of the quicksilver is but now commenced under great disadvantages, from not having any of the materials generally used in extracting that metal."

After describing, in general terms, the Mexican laws of denouncement, he says:

"Up to the present time there are few or no persons in California, with sufficient energy and capital to carry on mining, although a Mexican officer of the army, a padre, and a native of New York are, on a very small scale, extracting quicksilver from the San José mine."

The three persons referred to by this letter will readily be recognized from the proofs. They were Captain of Cavalry D. Andres Castillero, Padre Real, one of his partners, and William G. Chard, of Columbia county, N. Y. (*See Chard's Testimony, pp.* 1068 *to* 1070—*p.* 1072, *Q.* 25.)

This letter was also found in the Department of State. (*See Certificate of Secretary Cass, p.* 2657.)

This consular book would appear to have been placed by Mr. Larkin in charge of Edmund Randolph, Esq., and his client Laurencel, the opponents of this claim, hereafter more particularly mentioned. After

Mr. Larkin's death it was traced to Mr. Randolph's office and there found in his safe (p. 2660, Q. 10. p. 2666, Q. 37).

The letters read from Consul Larkin's book were in the handwriting of *Allen*, a clerk of Mr. Larkin. Allen died prior to 1850 (p. 2660, Q. 11, 12).

William F. Swasey verified these copies. He testified that he had been a clerk or bookkeeper to Sutter; that he left the fort before Christmas, 1845, and went to San Francisco; that about the last of Feb., 1846, he went to Monterey and became Consul Larkin's clerk, and was familiar with the correspondence in question. He said, "I did most of the original writing under Mr. Larkin's dictation. * I knew Castillero first when he visited Sutter's Fort in November, 1845."

Q. 20.—"Before you left San Francisco, in the first part of the year 1846, for Monterey, had you ever heard of the discovery of a quicksilver mine in California by Andres Castillero? If so state generally what you heard about it."

A.—"I had heard frequently Capt. Leidesdorf, Hinckley, and others speak of the discovery by Don Andres Castillero. * * * The fact of the discovery was notorious. After I arrived at Monterey in the spring of 1846, it was the subject of conversation between all intelligent persons." * * *

He further testified that Mr. Larkin visited the mine in April, got specimens of the ore, smelted it in a gun-barrel, and sent specimens of the ore itself, and of the quicksilver in quills, to various persons—to Hon. Daniel Webster, T. H. Benton, James Buchanan, and others. (*See Swasey's testimony, pp.* 2659 *to* 2666.)

In this same consular letter book was also found a letter of Mr. Larkin's, without any address, dated July 2, 1846, stating in detail the discovery and denouncement of this quicksilver mine "before the nearest Alcalde," stating all the particulars to be found in the other letters, pointing out how "the specimen I send can be proved," &c. (pp. 2671, 2672).

This letter was printed in the "Polynesian," a newspaper published at Honolulu, in the Sandwich Islands, July 25, 1846. It was there dated June 24, 1846, and addressed to G. P. Judd (p. 2665, Q. 34).

Charles E. Hitchcock (p. 2647), who was the printer of the "Polynesian" at the date in question, proved the paper, and further testified as follows:

"*Q.* 5.—I find in this number of the "Polynesian" a letter from G. P. Judd to J. J. Jarvis, editor, dated July 20th, 1846, in which Mr. Judd informs the editor that he forwards for publication a letter from Thomas O. Larkin, U. S. Consul at Monterey, and that he also sends him a specimen of the precious ore mentioned in Mr. Larkin's letter. Do you remember anything about this note of Mr. Judd and the accompanying letter of Mr. Larkin, and the specimens sent by Mr. Larkin?

"*A.*—I was at that time printer of the paper, and remember receiving the note of Mr. Judd, the letter of Mr. Larkin, and the sample of quicksilver ore. It was printed at that time, and the letter, as printed in this paper, is a copy of the letter sent by Mr. Judd to the office. I think Mr. Judd sent the original letter from Mr. Larkin, which, I think, I returned to Mr. Judd. Mr. Jarvis, the editor, was absent from Honolulu, and I edited this number of the paper."

Milo Calkin, who was U. S. vice-consul at Lahaina in the Sandwich Islands at the time, identified the paper, and testified to having seen the specimens of the ore, and having been much interested by them (p. 2645).

Neither Mr. Hitchcock nor Mr. Calkin were cross-examined (pp. 2648, 2646).

The slight differences between the letter to Mr. Judd, as printed in the Polynesian, and its match found in the consular letter book, were thus accounted for by Mr. Swasey:

"It was usual for Mr. Larkin, after compiling valuable information on the resources of the country generally, to send the same information to different persons, at times, perhaps,

slightly varied in expression." "It is very possible that the letter in the book may have been sent to some other parties; which would account for the apparent difference in date and phraseology" (p. 2665).

Frederick H. Larkin, the son, and Executor of Consul Thomas O. Larkin, produced from his father's files the letter of G. P. Judd, Minister of Finance, dated Honolulu, July 20, 1846, acknowledging the receipt of Consul Larkin's letter, "with a specimen of California quicksilver ore," and stating: "I have sent your letter to the editor of the "Polynesian" for insertion, and have no doubt it will be found as interesting to others as it has been to me" (pp. 3018–3020).

See *The "Polynesian" of July* 25, 1846 (pp. 2223–2226).

This article in the "Polynesian" was commented upon and its general purport stated in several newspapers printed in the city of Mexico in December, 1846 (pp. 2355, 2356).

A file of the "Polynesian" is in the State Department; but the Secretary of State refused to furnish the claimant's counsel with a copy of this article extracted from such file to be offered as evidence in this case. *See* Mr. Cass' letter, p. 3012.

There is a great amount of other evidence scattered through the case confirming the contemporaneous notoriety of the discovery and of the denouncement. Occasional references may be made to that additional evidence.

The notoriety of the discovery in the city of Mexico in April and May, 1846, is hereafter still more fully shown.

See this Brief, pp. 154 to 169.

Continuous Working of the Mine.

As early as Aug. or Sept., 1846 (*p.* 540), James A. Forbes, then British Consul for California, received possession of the mine from Padre Real, the partner and representative of Castillero, and became its director (p. 445, 446); Chard, one of the witnesses, was then major-domo or superintendent He had one blacksmith and some Indians assisting him. J. A. Forbes found 2,000 lbs. of quicksilver on hand (p. 447).

J. A. Forbes, on January 30, 1846, addressed a letter to his correspondent, Alexander Forbes of Barron, Forbes & Co., a mercantile house at Tepic in Mexico, and British Consul at that place, introducing this mine to his attention (p. 540). A. Forbes made inquiries concerning it (p. 382), and finally, on Dec. 17, 1846, purchased five shares or *barras* in it from Castillero, and, for himself and his associates, entered into an *Avio* with Castillero and his partners to work the mine on shares for 16 years (p. 2498 to 2530).

These men, though of the same name and country, were not relatives. J. A. Forbes is a very conspicuous person in this record. A. Forbes, as a large shareholder in the mine and a prominent party in the *Avio*, took an active part in the transactions now under review from Dec., 1846 until 1851 (p. 407). Having become very aged, he retired from business about that time, and took up his residence in Great Britain (p. 364, Q. 191 to 194—p. 454).

In March or April, 1847, Walkinshaw, by appointment of A. Forbes, took possession as director in the room of J. A. Forbes (pp. 272, 275,—p. 360, Q. 167, 168.)

J. A. Forbes was again appointed director April 23, 1849 (p. 510). He received possession from Walkinshaw in Aug. '49 (p. 487), and held it as such until

May, 1850 (pp. 435, 177, 339, 579). At that date J. A. Forbes surrendered possession of the mine to Mr. Della Torre, representative of the *Aviadores*, who placed H. W. Halleck, Esq., in charge as director or superintendent (p. 328).

The gradually increasing developement of the mine by Castillero's grantees scarcely needs proof. But see:

Parrott's sworn answer put in ev. by U. S. (pp. 214 to 215, §§ 8 to 11).

Attorney General's very adverse report in 1859, representing its value as enormous (p. 2991).

Fernando Alden, agent and overseer of Castillero's grantees (p. 9), testifies as follows:

"I first went upon this land as an agent, in March or April, A. D. 1847; the mine had been worked by Castillero to a considerable extent, and some small buildings erected. The works were then commenced on a large scale, and have been continued ever since to the present time" (*i. e.*, April, 1853). "The amount of money expended in these works, the erection of buildings, furnaces, and store houses, and in the construction of roads, bridges, &c., has, to the best of my knowledge and my belief, been about one million of dollars. A portion of the land has been and now is occupied by the works, furnaces, and buildings of the claimants, and the other portions as pastures for the animals used on these works, and for cutting fuel for the furnaces; the land embraced in this claim is all very rough and mountainous, and is only useful as woodland and as pasture, not being suitable for cultivation."

We next proceed to:

The Alcalde's Act of Possession.

SEÑOR ALCALDE OF FIRST NOMINATION:

Andres Castillero, Captain of permanent Cavalry, and at present resident in this Department, before your notorious justification, makes representation, that having discovered a

vein of silver with a *ley* of gold, on the rancho pertaining to José Reyes Berreyesa,* retired Sergeant of the Presidial Company of San Francisco, and wishing to work it in company, I request that, in conformity with the ordinance on mining, you will be pleased to fix up notices in public places of the jurisdiction, in order to make sure of my right when the time of the juridical possession may arrive, according to the laws on the matter.

I pray you to provide in conformity, in which I will receive favor and justice; admitting this on common paper, there being none of the corresponding stamp.

Pueblo of San José Guadalupe, November twenty second, eighteen hundred and forty five.

ANDRES CASTILLERO.

SEÑOR ALCALDE OF FIRST NOMINATION:

I, Andres Castillero, Captain of permanent Cavalry, before your well known justification, appear and say, that on opening the mine which I previously denounced in this Court, I have taken out besides silver with a ley of gold, liquid quicksilver, in the presence of several bystanders, whom I may summon on the proper occasion.

And considering it necessary for the security of my right so to do, I have to request of you, that uniting this representation to the denouncement, it may be placed on file; it not going on stamped paper, because there is none.

I pray you to take measures to this effect, in which I will receive favor and grace.

Santa Clara, December 3d, 1845.

ANDRES CASTILLERO.

There being no deputation on mining in the department of California, and this being the only time since the settlement of Upper California, that a mine has been worked in conformity with the laws; and there being no *Juez de Letras* (Professional Judge) in the 2d District, I, the Alcalde of 1st Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the Rancho of the retired Sergeant José Reyes Berreyesa, for the

* This will appear to be a mistake founded on a fraudulent misrepresentation of Berreyesa. See this Brief, pp. 62 to 65.

time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of *liquid quicksilver*, as shown by the specimens which this Court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgation of gold and silver in the Republic, I have granted three thousand varas of land in all directions, subject to what the general ordinance of mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the expediente, deposited in the archives under my charge; this not going on stamped paper, because there is none, as prescribed by law.

Juzgado of San José Guadalupe, December 30, 1845.

ANTONIO MARIA PICO.

Assisting witnesses:

ANTONIO SUÑOL,

JOSÉ NORIEGA.

At a late stage of the numerous investigations in this case, a fact appeared which was previously unknown to the claimant's counsel, and apparently not at first remembered by the witnesses. This *Act of the Alcalde* was executed in duplicate. The duplicate retained in the *juzgado*, as a part of the Alcalde's Archives, was dated thus: "Dec. 1845." The duplicate delivered to Castillero bore the date "30*th*," as above. *See this Brief*, pp. 69 to 90.

Independently of a mass of corroborating circumstances, the verity of this Act is testified to by the *Alcalde* himself, by his secretary or clerk; by both of the assisting witnesses, and by *Chard*, the first superintendent or major-domo in the mining works.

Second Testimony of Alcalde Pico, pp. 635. Q. 27, pp. 639 to 648.

See exhibit I. Y. No. 1, p. 2688. Transl'n, p. 2693.

Third Testimony of Alcalde Pico, pp. 2731 to 2751. And especially p. 2731, Q. 2.
First Testimony of Antonio Suñol, pp. 24 to 27.
Second Testimony of Antonio Suñol, pp. 409 to 418.
Third Testimony of Antonio Suñol, p. 2718, Q. 2, p. 2724, Q. 46 to Q. 60.
First Testimony of José Noriega, pp. 22 to 24.
Second Testimony of José Noriega, pp. 418 to 423.
Third Testimony of José Noriega, pp. 2803 to 2805.
Testimony of José Fernandez, p. 600, Q. 5, p. 601, Q. 17 to 22. Cross Ex'n, pp. 604 to 612.
Testimony of Wm. G. Chard, p. 1069, p. 1077, Q. 71 to 90. Also, p. 1079, Q. 3 to 7, p. 1082, Q. 3, p. 1083, Q. 1.

The Supreme Government's Ratification.

On May 12, 1846, when presenting his proposals to the *Junta de Fomento*, etc., in the city of Mexico, for aid in his enterprise, Castillero (among other things) requested in his seventh proposition that the Junta should "represent to the Supreme Government the necessity of its approving the possession which has been given me of the mine by the local authorities of Californias, in the same terms in which I now hold it" (p. 1802).

On May 14, 1846, the *Junta de Fomento* reported Castillero's petition to the Minister of Justice, and recommended the confirmation (pp. 1798 to 1802).

On May 20th, 1846, the Minister of Justice, in a communication to the *Junta de Fomento*, stated that "His Excellency has been pleased to approve in all its parts the agreement made with Castillero, in order to commence the working of said mine; and on this day the corresponding communication has been made to

the Minister of Exterior Relations and Government to issue the proper orders respecting what is contained in the eighth proposition relative to the grant of lands in that department "(p. 1802).

Construing this in connection with the Minister's *acuerdo* on the margin of the *Junta's* report, authenticated by the Minister's Rubric (p. 1798), the claimant contends that the Government acceded to his whole petition "in the terms proposed." *See* this Brief, p. 161 to 164.

The Two League Grant.

On May 20, 1846, Becerra, the Minister of Justice, communicated to the Minister of Relations a copy of his said letter to the *Junta de Fomento*, "to the end that, with respect to the petition of Señor Castillero, to which His Excellency, the President *ad interim*, has thought proper to accede, that there be granted to him as a colonist, two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders referred to." (p. 1807.) *See* this Brief, pp. 164 to 169.

Accordingly, on May 23, 1846, *Castillo Lanzas*, the Minister of Relations, addressed a despatch to the Governor of the Californias, reciting the communication so received by him from the Minister of Justice, and adding, "I transcribe it to Your Excellency in order that, in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two leagues which are mentioned" (p. 1807). *See* this Brief, pp. 164 to 169.

The official counsel of the United States, from the outset, required strict proof of these acts of the Supreme Government, under the Great Seal of the Republic.

The Mexican law and practice did not allow such a use of the Great Seal. Efforts were made to procure the attendance of witnesses from Mexico; but they were defeated by the prevalence of a civil war in that country (pp. 1053, 1056, 2375, 2384).

Affidavit of Wm. E. Barron, pp. 13, 14, 15.

These circumstances seem to have delayed the proceedings; for it was not until January 29, 1855, that the claimant produced before the commission, as a witness, José Maria Lafragua, who, in the latter part of 1846, was Minister of Foreign Relations, and by him verified the copies of his Mexican documents.

See the *Mexican Documents, pp.* 34 *to* 48.
Translation thereof, pp. 49 *to* 69.
Report of the witness Lafragua to the Mexican Congress in 1846, *p.* 69.
Translation thereof, p. 71.
Testimony of Lafragua, pp. 15 *to* 22.

Course of Proceedings on this Claim anterior to the suggestion that Castillero's title was fraudulent or antedated.

The evidence of title exhibited to the Board of Land Commissioners gave rise to certain questions of law. The discussions in that tribunal were active, and in point of *animus*, very adverse. They induced a division of opinion among the commissioners. Still, the controversy was confined to the points of law (p. 2967). No inference is deducible from the appeal to the District Court; for it was the uniform practice of the Government to appeal from every confirmation.

THE QUESTIONS OF LAW WERE AS FOLLOWS:

First. Whether the action of the Supreme Government in respect to the two square leagues of land,

amounted to an effectual grant thereof, under the Mexican laws.

Land Comrs. per Felch, contra, pp. 103, 104.
Comr. Thompson, contra, p. 121.
Judge McAllister, contra, p. 3415 *to* 3426.
Judge Hoffman, pro, p. 3544 *to* 3582.

Secondly, Whether the proceedings for the purpose of assuring his title to the mine, taken by Castillero, in California in November-December, 1845, before *Alcalde* Pico, were instituted in the proper tribunal, and were otherwise, in substance, sufficient for that purpose, under the mining laws of Mexico.

Land Comrs. per Felch, pro, pp. 81 *to* 89.
Comr. Thompson, contra, pp. 105 *to* 111.
Judge McAllister, pro, pp. 3373 *to* 3381.
Judge Hoffman, pro, pp. 3490 *to* 3506.

Thirdly, If any defects should be found in the proceedings before the local tribunal, then, whether the action taken in the premises by the Supreme Government at the city of Mexico in May, 1846, had obviated such defects, and imparted validity not merely to Castillero's possession of the mine itself, but also to his possession of the 3000 varas specified in the Alcalde's act.

Land Comrs. per Felch, pro, pp. 89 *to* 103.
Comr. Thompson, contra, pp. 111 *to* 121.
Judge McAllister, contra, pp. 3408 *to* 3415.
Judge Hoffman, contra, pp. 3533 *to* 3544.

Fourthly, Castillero having been indisputably the first discoverer, having by meritorious efforts developed it, having made a *bona fide* effort to comply with the forms prescribed in such cases by the laws of Mexico for perfecting and assuring a legal title by discovery, and having, in fact, made the closest approximation to an exact and literal compliance with such forms that

was possible under the circumstances, it was insisted on his behalf that these facts alone, under the mining laws in force at the time, invested Castillero with a perfect and unimpeachable title in equity to the mine itself, and to a certain easily ascertainable extent of the surface above it, as *pertenencia;* thus rendering immaterial, as it respects the title to the mine, all merely technical and formal inquiries concerning the acts of the Mexican authorities either in California or in the city of Mexico.

Land Comrs. by Felch, p. 94.
Judge Hoffman, p. 3448 *to* 3458.

Fifthly, On behalf of the government, it was denied that the jurisdiction conferred by the Act of Congress, extended to the confirmation of titles to mines or mining possessions by discovery or denouncement under the Mexican laws.

Land Comrs. per, Felch, pro, pp. 81, 98 *to* 103.
Comr. Thompson, contra, pp. 122 *to* 128.
Judge McAllister, pro, pp. 3359 *to* 3373.
Judge Hoffman, pro, pp. 3427 *to* 3447.

Judge Hoffman's opinion was substantially in favor of the whole claim, (pp. 3544 to 3580.) He held that Castillero had a valid equitable or inceptive title to the two leagues of land, by which Mexico was bound, (p. 3560;) but, considering that the Alcalde had no power to adjudicate a mining possession to a greater extent than seven *pertenencias*, (p. 3499 to 3506,) and that in his view of the documentary evidence, the Alcalde's Act, so far as it exceeded this limit, had not been ratified by the Supreme Government, his Honor held that Castillero's mining title, though valid, must be restricted to the seven *pertenencias*. (p. 3533 to 3544, foot of p. 3579.)

Judge McAllister held that the two-league grant was not valid; but he agreed with Judge Hoffman on the other points. Hence the limited nature of the confirmation adjudged in the District Court.

Statement of the matters of fact which give rise to the objections thus taken to the claimant's title, on mere legal grounds.

As to the Two-League Grant.

1st. The despatch of Castillo Lanzas, Minister of Relations, which contained this grant, was not addressed to Castillero; but only to the Governor of California.

2d. That despatch was never presented to the Governor of California; and, consequently, no formal possession having been given to Castillero as contemplated by the despatch, his title was not consummated.

As to the Alcalde's Act of Possession.

1. It was claimed that the evidence did not establish that the Alcalde had measured off to Castillero the *pertenencias*, and that the Alcalde had not gone through any precise forms. It was said that he merely attended on the ground with his assisting witnesses, declared that he gave possession, and drew up the writing called his Act, with Castillero's assistance.

Testimony of PICO, p. 647, Q. 87, 89, 90. Also, at p. 2733 to 2735.

2. It was insisted that no stakes had been set up to mark the boundaries of the *pertenencias*.

See same Testimony of PICO.

3. Whether or not the Alcalde was the proper local officer, and had authority to adjudicate this mine

to a discoverer according to the mining ordinances, is, of course, a question of law. But some evidence was given in relation to it.

It will presently be seen, that if there had been in California, what is called a *mining deputation*, that might have been the only proper juridical authority in the premises.

Francisco De Leon, sworn in March, 1855, testified:

"My age is sixty-five; I lived in the Mexican Republic all my lifetime until 1849; have lived in various parts of it, but longer in Sinaloa than any other; I have lived in Durango and Chihuahua, which are mining districts. I have held several military and civil offices, such as prefect, subprefect, and judge, and was elected as a member of the Legislature of Sinaloa, but did not serve in that capacity. I am acquainted with the mode of registering the discovery of new mines, and denouncing old ones. The proceedings are held before the Judge of the First Instance; but where there is no such judge, it is done before the nearest alcalde, who by law is authorized to give possession of the same. Ever since the establishment of the Mexican Republic, such proceedings have been held before the officers above named. Before the republic was established, the Tribunal of Mines (Tribunal de Mineria) was established in the City of Mexico; and in the mining districts there was a deputation having special jurisdiction in the matters relating to the mines; but under the Federal Government these were abolished, and jurisdiction in the registering of the discovery and the denouncement of mines given to the Judge of the First Instance and to the Alcalde, as above stated." (pp. 30, 31.)

Domingo Danglada testified that he had lived in Mexico for 22 years next prior to 1849; that he was engaged in copper mines mixed with gold in the state of Sonora. "I am familiar with the mode of registering and denouncing mines. The proceedings are before the Judge of the First Instance, or, in his absence, before the Alcalde. Formerly there were tribunals having special charge of mining affairs, but since the adoption of the Federal constitution there have been none such." (p. 29).

Francis Villegas testified that he lived in La Paz, the Capital of Lower California, and at different periods between 1830 and 1848, held judicial offices there. That there never had existed to his knowledge "in Lower California, any tribunal, court or officer exercising special jurisdiction in matters relating to the registry or denouncement of mines. The first civil judicial authority had jurisdiction over mining matters. Sometimes the Judge of the First Instance, sometimes the Alcalde; but always the first local judicial authority." He related an instance which occurred before himself as Judge of First Instance, and added, "I never was present at any other; but I know that the judges gave possession of all mines that were denounced or registered—that is, the highest civil judge." (pp. 133, 134).

John P. Brodie testified at length to the same effect, based upon knowledge and practice; and also that with two slight exceptions, he resided in the Mexican Republic, but not in California, for 30 years next previous to 1854 (pp. 135 to 140).

Further testimony to the same effect.

Certificate of Enciso, president of the territorial mining deputation of the state of Oajaca (p. 3046).

Segura's ex parte deposition (p. 3112).

Exhibit Castillero No. 1 (pp. 2905, 2912).

Translation thereof (pp. 2913 to 2920).

Exhibit (pp. 816 to 820).

José Fernandez testified that in 1844, '5 and '6, there was no Judge of First Instance that he knew of, exercising jurisdiction in the department of California. (p. 32).

It seems, however, that the Alcalde Antonio Maria Pico, by virtue of his office as Alcalde, was Judge of First Instance at the time he gave the juridical possession to

Castillero. The United States proved this by himself (p. 2747, Q. 83).

4. There is not in the evidence any distinct explanation as to the purpose for which 3,000 varas were granted by the Alcalde; nor is it clear what either Castillero or the Alcalde meant by that part of the Act. Castillero and the Alcalde had, at the time, a copy of the Mining ordinances (p. 643, Q. 74, 80). But the Alcalde was not a learned man; nor was Castillero a lawyer. It is not certain that either of them understood perfectly the practical directions of the ordinances, (p. 2742, Q. 45, 46—p. 647, Q. 87—p. 2680).

Castillero may have relied, in some measure, on the consent of Berreyesa, the supposed owner, so far as he might possibly trench upon private property (p. 647, Q. 89 to 92--p. 2733, Q. 10 to p. 2739—pp. 2749 to 2751). No doubt he considered that his merits as a discoverer of this great *desideratum*, a quicksilver mine, would ensure a confirmation of his claim to any public land.

The mining ordinances, by detailed provisions which, however, are susceptible of misinterpretation, allow to the discoverer of a mine certain *pertenencias*. A *pertenencia* is "a parcel of mining ground of dimensions assigned by law." (*Heathfield's Gamboa. Preface xxiii., note* ‡).

For years it seems to have been a puzzle to persons concerned in this mine how much surface, or in other words how many *pertenencias*, Castillero, or himself and his partners were entitled to.

In addition to these *pertenencias* or mining spaces being surface beneath which the mineral was supposed to lie, the mining ordinances contemplated that there might be adjudicated to the discoverer's use for *hacienda*,

or smelting and other works, water, &c., the necessary quantity of land.

The ordinances evince care in respect to the extent of the mining *pertenencias* to be adjudicated to any one person or company; but they are altogether indefinite as to the quantity of land to be allowed for these other purposes.

Consequently, it is a mere matter of inference and construction, whether Castillero claimed or desired this "3,000 varas in all directions," from the mouth of the mine, as mining *pertenencia*, or whether he did not merely claim it as *land* for the use of his *hacienda*, &c.

Before the date of the Alcalde's Act of Possession, Castillero applied to the public authorities for a grant of public land. On December 10, 1845, he addressed Gov. Pio Pico thus: "We wish that the vacant lands *near* our works be conceded to us, to cut wood" (p. 1806). See p. 3068, items first, third and fourth.

Facts in evidence bearing upon the objection to the ratification by the Supreme Government of Mexico.

Castillero had a personal audience before the Mining Board, in the City of Mexico, on May 6, 1846 (p. 3193).

And, by desire of the Board, he put his proposals for aid in writing, May 12, 1846 (pp. 1800 to 1802).

In this document he set forth his discovery, and that he had "denounced and taken possession not only of said mine named Santa Clara; but also of an extent of 3,000 varas in all directions from said point."

He also proposed an agreement with the Board to purchase from it, at a fixed price, certain retorts and flasks, and that it should advance him $1,000 "to pay for the retorts, cylinders, and other kinds of small ap-

paratus," all this to be paid for in quicksilver at prices specified. And he also asked for a loan of $5,000 by draft "on some mercantile house in Mazatlan."

The seventh and eighth items in his proposals (p. 1802) were as follows:

"*Seventh.*—The Junta shall represent to the Supreme Government the necessity of approving the possession, which has been given me of the mine by the local authorities of California, in the same terms which I now hold it.

"*Eighth.*—It shall also represent the advantage of there being granted to me as a colonist, two square leagues upon the land of my mining possession, with the object of enabling me to use the wood for my burnings."

Whether Castillero exhibited the Alcalde's Act of Possession does not appear; but, if his taking possession of 3,000 varas in every direction was an irregularity or a pushing of the local jurisdiction beyond its just limits, he did not conceal the fact.

The United States deny that the Mining Board of 1846 had any judicial authority, or any power to grant or confirm mining possessions.

It is contended that by the rules then governing it, the Mining Board could only recommend the petition of Castillero to the Government. And it is said that both the Board and Castillero so supposed, for they both acted accordingly.

On the 14th of May, 1846, the Board thus addressed the Minister. (pp. 1798–1800.)

JUNTA FOR THE ENCOURAGEMENT AND ADMINISTRATION OF MINING.

MOST EXCELLENT SIR:

As this Junta had the honor to inform your Excellency on the 5th inst., in number 573, Señor Don Andres Castillero has directed to it a petition, the original of which it has the pleasure to transmit herewith, regarding the assistance which he needs for the new discovery of the Quicksilver mine in the Mission of Santa Clara, in the Department of Californias.

The Junta has no hesitation in recommending said petition to your Excellency; for, being persuaded of the great importance of the enterprise, it considers it entitled to all the protection of the Supreme Government; and also the particular circumstances of that Department, and the just desire which his Excellency the President has shown to preserve the integrity of the National territory, render it worthy of the greatest consideration. The Junta is consequently of opinion that there should be immediately furnished to Señor Castillero the sum of five thousand dollars on the terms he proposes; that it should be authorized to furnish him with the iron retorts and flasks belonging to it, and the other thousand dollars, which can be employed in the construction of retorts, cylinders, and other small apparatus of distillation for said mine. Although the law authorizing the Junta to make loans for the encouragement of deposits of quicksilver, exacts a premium of five per cent. per annum on the capital loaned, it is indubitable that the proposal of Señor Castillero to pay the five thousand dollars with fifty quintals of quicksilver placed in Mazatlan at the disposition of the Junta, at the rate of one hundred dollars each, and in the term of six months, offers greater advantages to the fund than the said interest. The urgency shown by Señor Castillero to accomplish his journey to that Department, and what his so doing may contribute, under present circumstances, toward the preservation of the National territory is, in the opinion of the Junta, a more than sufficient motive to leave until a more opportune occasion the formation of a contract of partnership or of "avio" for the encouragement of said mine. It remains then to state to your Excellency, that although the possession given to Señor Castillero by the local authorities of California, has not been in conformity with the ordinance, inasmuch as there have been granted him "pertenencias" to the extent of three thousand varas, which are equivalent to fifteen "pertenencias" according to the second article of the eighth title; yet it is necessary to consider that he has in his favor the qualification of being discoverer of *an absolutely new hill in which there was no mine. open*, to whom there are granted, in the first article of the sixth title, *three "pertenencias"* either *continuous or interrupted, and if he shall have discovered other veins, one* ("pertenencia") *in each of them.* He has also in his favor the circumstance that he works it in company with others, to whom there is granted that, without prejudice to the right which they may have by title of discoverer, when they are such, they may denounce four new "pertenencias," even though they are contiguous and in the same direction; but what is most worthy of con-

sideration is that, California being a frontier department, and frequently threatened by the emigrants from the United States of the North and by the new colonists of Oregon, it seems proper to grant to the first mine discovered in a department so extensive, a greater number of "pertenencias," which view is corroborated by the reason found at the end of the eighth title, art. 1, which says: "Considering the limits established in the mines of these kingdoms, to which those of New Spain have until now been made to conform, are very contracted in proportion to the multitude, abundance and richness of the metallic veins which the goodness of the Creator has pleased to grant to those regions, I order and command that in mines which may hereafter be discovered in the new vein, or without neighbors, these measurements be observed. 2d. Along the thread, direction, or course of the vein, be it of gold, silver or other metal, I grant to every miner, without distinction of the discoverers (who have their reward already assigned to them) two hundred Castilian varas, called 'varas de medir,' measured on a 'level.'" Lastly, in the first article, eleventh title, it expresses itself in these terms: "And the capital of a single individual not being sufficient for great undertakings, while that of all the partners may be, I will and command that such companies be encouraged, promoted and protected by all suitable measures, my Viceroy granting to those who may form such, every favor, aid and exemption which can be granted them, according to the judgment and discretion of the Royal Tribunal of Mining, and without detriment to the public or to my Royal Treasury." In reference to the ownership of two square leagues which Señor Castillero solicits as a colonist, upon the surface of his mining property, for the purpose of supplying himself with the firewood necessary for the reduction of ores (beneficio): the Junta not having the necessary information on the matter, of which the Supreme Government has abundance, His Excellency the President will decide as he may think proper. In this view, on sending up to Your Excellency the petition of Señor Castillero, this Junta has no hesitation in recommending it very efficaciously on account of the vital importance of the undertaking, its incredible influence upon the general good and prosperity of the Republic. The Junta has the honor on this occasion to repeat to your Excellency the assurances of its distinguished esteem and consideration.

God and Liberty. Mexico, May 14th, 1846.

(Signed) VICENTE SEGURA,

President. [Rubric.]

His Excellency the Minister of Justice and Public Instruction.

The Board was mistaken in one thing. It speaks of the 3,000 varas as equivalent to 15 *pertenencias.* This was simply laying down that number of them, like so many lots in one of our city blocks, and measuring the entire length along them. But Castillero's written statement then before the Board expressly stated that he had taken "3,000 varas in every direction from said point," *i. e.*, the mine. This was unmistakably a piece of land 6,000 varas square, which, if cut into mining *pertenencias*, would make several hundred of them (pp. 361 to 363, Q. 176 to 183—p. 1317, Q. 604 to 618). Besides, a piece of land 6,000 varas square would comprise two thirds of the area of two square leagues. So, it has been urged that if Castillero really intended to ask for a title to the "3,000 varas in all directions," under his seventh proposition, he intended no more by his eighth proposition than to obtain another and an inferior title to the same identical land with indeed a trifling addition of area.

It is claimed that Castillero did not state in his proposals to the *Junta* that he had taken this 3,000 varas in all directions as *pertenencias;* and that the Board did not understand his seventh proposition as claiming or desiring so great an area. And it is claimed that the Government acted upon the Board's interpretation of Castillero's petition. That interpretation would seem to have been that the Juridical Act of the local magistrate in respect to the adjudication of mining *pertenencias* or spaces was, perhaps, irregular, and, in a comparatively moderate degree, an excess of jurisdiction.

The judges below had no occasion to consider the question whether the acts of the Government did not amount to a confirmation of the title to the mine itself, with such extent and number of *pertenencias* as the

mining ordinances might allow in the case; for they held the Alcalde's Act to be, of itself, valid and effectual to that extent.

The District Court held that the Mexican Government did not understandingly ratify the Alcalde's concession to Castillero of lands to the extent of 3,000 varas in all directions from the mouth of the mine.

There is nothing whatever in the evidence throwing the least light upon that point except the documents already recited. It presented in the Court below and presents here merely a question as to the true legal import and effect of this documentary evidence.

SECOND DIVISION.

As has been stated (ante p. 4), this division is mere surplusage. It is devoted to an exhibition of the attempts to impeach the genuineness of Castillero's title-papers, and of the total failure of attempted impeachment.

Preliminary Observation

Every witness produced by the claimant who gave testimony concerning any document or paper which he wrote, or signed, or had any contemporary personal knowledge of, testified in effect that, to the best of his knowledge, recollection and belief, the same was not antedated; but was really and truly made according to its purport. This fact is stated here to avoid repetitions in detailing the testimony. No such witness produced by the United States testified otherwise, except one. This was *Benito Diaz*, the scrivener of a single very unimportant paper; and he was justly deemed unworthy of credit.

See this Brief, p. 174. 175.
Judge Hoffman's opinion, p. 3477.

FIRST HEAD.—*Means whereby the charge of forgery and antedating found a place in the record; date of its origin; its cause and the method of its prosecution.*

Owing to the supposed value of the mine and the influx of adventurers, athirst for wealth, intensely hostile litigations arose in California concerning the title as early as 1849 and '50. In many forms, between various parties and in various Courts, such litigation had been in constant progress from that time forward; yet, it was not until the summer of 1857, more than a year after the appeal to the District Court, and in the twelfth year of a continued notorious and uninterrupted possession of the mine by Castillero and his associates or assigns, accompanied, at all times, by actual and costly work in production of the mineral, that a doubt was suggested as to the genuineness or truthfulness of Castillero's title papers.

How the charge arose.

Two rival parties appear on the record, claiming this mine, each adverse to the other, and both adverse to Castillero. In or prior to July, 1850, Roman, Hepburn, and others took a 20 years' lease of this mine from the Berreyesa family, and sought to establish for the Berreyesa ranch, boundaries which would include this mine (p. 200). See also, as to a prior adventure of the same kind, pp. 212, 218. These lessees immediately commenced suit; but from what is next stated, it would seem that ultimately, they abandoned the speculation. In November, 1853, C. K. Garrison, J. M. Moss, H. J. Thornton, V. E. Howard, and J. D. Marks, entered into an agreement with the Berreyesas to sue for and judicially establish the said Berreyesa

title to this mine—on shares, 11 barras to the Berreyesas, 13 to these undertakers.

Testimony of Marks, p. 2831.
Contract, pp. 2837 *to* 2844.

The counsel for the Government used against Castillero's claim certain unimportant testimony furnished by these last mentioned Berreyesa claimants (pp. 2819 to 2864). But the Berreyesa claim was not favored by the law officers of the Government. It has been strenuously opposed; and thus far it has not been successful.

See this Brief, pp. 63, 64.

The other claim to this mine is known in this Court as the *Fossat* claim.

U. S. v. Fossat, 20 *How.* 413.
U. S. v. Fossat, 21 *How.* 445.

These claimants are Henry Laurencel and James Eldridge, purchasers through Charles Fossat, from the family of Justo Larios, whose ranch adjoins that of the Berreyesas. The object of Fossat's assignees was similar to that of the Berreyesa claimants, *i. e.*, to obtain a construction of the Larios grant, or a survey under it which would include this mine.

See Espediente of Justo Larios and translations, pp. 773 to 780.
Testimony of Henry Laurencel, p. 376.
Wm. J. Lewis relative to survey of the mining possession and of the Berreyesa and Larios ranches, pp. 2649 to 2656.

The law officers of the Government did not strenuously oppose the Fossat claim.

Attorney General's letter, p. 2944.
Letter of R. Johnson and J. A. Rockwell, Esq., pp. 2969, 2970.
U. S. v. Fossat, 20 *How.* 419; CAMPBELL, J. p. 425.

As has been said, the charge that Castillero's title papers were forged and antedated, had its inception in the summer of 1857 (pp. 165, 252). It was then also that, for the first time, the late EDMUND RANDOLPH, Esq., appeared in this case nominally as counsel for the Government. He was avowedly and in fact (p. 880, Q. 69) private counsel for Laurencel *et al.*, the Fossat claimants.

With a very few exceptions, the examinations were thenceforth conducted by Mr. Randolph exclusively. And, thenceforth, the opposition to Castillero's title assumed an attitude as "contentious," and maintained a line of forensic practice as rigorously disputatious as has ever been exhibited by a private litigant, or permitted in a court of justice. *See remarks per* CAMPBELL, J., *U. S. v. Fossat*, 21 *How.* 450.

From this point, *i. e.*, p. 252, the stream of contention rolled onward and abroad in all conceivable directions until, at the end of 2652 additional pages of testimony, its power of expansion was exhausted (p. 2904). Mr. Randolph addressed to one witness 660 cross-interrogatories (p. 2373). Some of them were of surprising length (pp. 2306, 2317). This witness was a gentleman of great distinction, had been twice Prime Minister of Mexico, had served for many years as Minister from that Republic to Great Britain and the United States, and filled many other high trusts during thirty years of public life.

The main, if not the exclusive object of *all* these cross-interrogatories was to throw a doubt upon his identity. This is mentioned as a specimen.

Mr. Randolph alone appeared on the Government side at the final hearing. His argument occupies about 300 pages. *See vol.* 5, pp. 819 to 1113.

The law officers of the Government did not withhold from this line of resistance their official sanction.

The charges of forgery and antedating were examined in the District Court by the judges with great care and

with close attention to the most trifling minutiæ. Each of the judges closed his elaborate scrutiny with a rejection of these charges as wholly unfounded.

See Judge McAllister's opinion, pp. 3381 to 3408.

See Judge Hoffman's opinion, pp. 3458 to 3490, 3510 to 3530.

The evidence in support of the claim is superabundant, and no part of it is subject to any fair criticism. But if it were very slender, the line of practice adopted in the name of the Government for the purpose of preventing the introduction of proof, might justify a Court of Equity in decreeing a confirmation.

See this Brief, pp. 137 to 144.

SECOND HEAD.—*Attempted impeachment of the Alcalde Pico's juridical Act as a posterior fabrication.*

The stress of the charge of forgery and antedating referred, indeed, to the papers certified from the public archives in the city of Mexico; the claimant's evidence supporting the authenticity of the Alcalde's papers, was excessive in quantity and unimpeachable in quality; and the Government never produced a paper which referred to it or interrogated a witness who knew anything of the matter, without adding still further evidence in support of it; yet everything was disputed. Hence the multitude of facts which it becomes allowable to state and arrange under this head.

The evidence as to each suspicion intimated by argument in the Court below, will be numbered and headed "*Suspicion No.* 1," *&c.*

Preliminary Observations.

The Spanish and Mexican officials construct in the following manner, the formal record of public acts deemed to require that solemnity: Each paper, be it an application, an order, a report, or other writing, is at its date or receipt placed as it were upon a file appropriated to the particular matter to which it appertains, at all stages toward the completion of the matter, and whether it be ever completed or not. This file of papers is called an *espediente*. Consequently in the short minutes of a court or board, the action on any particular paper which should be thus kept, often closes with directing it "to *its espediente*." For specimens of this order, see pp. 3174, 3175 last line, lines 6, 14—3177 lines 15, 34—3185 lines 16, 32, 36—3188 line 14—3195 line 28—3196 lines 12, 38—3235 line 25—3260 line 31, and a multitude of other instances throughout the record. *Halleck's Testimony*, p. 352, Q. 115, 116, p. 2192, Q. 326.

For specimens of an espediente see pp. 257, 794, 773 to 775, 781 to 787, 1783 to 1815.

The *espediente* differs but slightly from the formal record of judgment in the English common law practice. The latter, at least in modern times, was a methodical history by formal entry of the acts done, and not a mere stringing together of the original papers. But these very entries had a moral conformity to the *espediente* which is somewhat striking. They always ran in the present tense. In intendment of law they are made at the very time of the occurrence of the act recorded. The enrolled decree of English chancery is an exact counterpart of the Spanish *espediente*. The English clerk, indeed, does not begin to form his enrollment until a decree is made. Until then his papers are scat-

tered about his office. But the Spanish clerk begins his *espediente*, or enrollment, the moment the suit or business is initiated, if it be of a nature to require such a record.

In registries of discovery or proceedings in denouncement under the mining ordinances, the original petition, or written application, is not usually retained by the tribunal; but is delivered back to the applicant, as his evidence that he has complied with the ordinances. This paper is the *copia autorizada*, or proper original and primary evidence of such compliance. It is only for some special purpose that resort may be had to the registry, or what may be called the record, remaining in the tribunal.

H. W. Halleck's Testimony, p. 341, Q. 59, 61, 66, 69, 70, 106.

Premising these circumstances will facilitate in unravelling certain of the puzzles which were gotten up by the Government's counsel. Imaginary symptoms of forgery and ante-dating were suggested upon every accidental discrepancy between copies and upon every similar incident which presented itself. These crude imaginations formed the staple of resistance, and the display of their insignificance is the task performed under this, the Second Head.

Suspicion No. 1.

About the time of Castillero's proceedings before the Alcalde Pico, in November and December, 1845, he formed a partnership to work the mine. The writing of partnership is dated at Santa Clara, *Nov.* 2, 1845. It purports to be between Castillero and José Castro, S. Robles and T. Robles, and the Friar Padre Real. Castillero, "conforming in all respects to the ordinance of mining, forms" with them a "perpetual

partnership" in "a mine of silver, gold and quicksilver." "The half of the mine, which is that of which he can dispose, will be divided in three parts in this manner: 4 shares to José Castro, 4 shares to S. & T. Robles, the other 4 to Padre Real, as a perpetual donation." "That prescribed by the ordinance of mining being complied with in everything"—"Castillero will direct the labors," &c., "and in his absence" "Padre Real." Each partner is restrained from alienating his share on pain of forfeiture to the others.

See copies in Spanish, pp. 314, 624, *translation*, p. 77.

The representation made by Castillero to the Alcalde, dated Nov. 22, called the mine a "vein of silver with a ley of gold." His second representation, dated Dec. 3, states a discovery of "liquid quicksilver" subsequently to his first representation; *yet* the article of partnership, bearing date twenty days prior to the first representation, speaks of the mine as containing all three of the metals.

Here is indeed a discrepancy. But certain circumstances show very clearly that this word "November" was an inadvertent slip of the writer. It should have been December.

There is abundant evidence that the quicksilver, at least to any appreciated extent, was first perceived to exist at a date later than Nov. 2, 1845. *Gen. José Castro* testifies (p. 2613) that Castillero's first visit to the mine was when the party halted at Santa Clara, on their way to Sutter's Fort early in Nov.; that Castillero then made but a slight examination; that the party proceeded thence, *via* Sonoma, to Sutter's Fort; and that they returned, *via* San José, crossing the San Joaquin river, to Santa Clara, where he, J. Castro, left Castillero, and returned to Monterey (p. 2613, Q. 5, 6, 7). On cross-examination the testimony of this witness was not precise as

to dates (pp. 2633, 2634). But all requisite certainty on that point was otherwise attained.

By the testimony of *Gen. Vallejo* and the certificate of baptism, it appeared that the party were at Sonoma on Nov. 6, 1845, and that Castillero on that day stood sponsor for the general's son Uladislao (p. 2597, Q. 3, 4). This latter fact was confirmed by written correspondence in the month of Dec., 1845 (pp. 2603 to 2605).

Sutter's Secretary kept a diary, and from it he testified that the party arrived at Sutter's Fort Nov. 11, 1845, and left on the next day for Santa Clara. This witness first heard that Castillero had discovered a quicksilver mine "after he left Sutter's Fort the same fall" (*Test'y. of John Bidwell*, pp. 2642 to 2644).

Jacop P. Leese joined the party *en route* to Sutter's Fort, at Sonoma, and there "Castillero conversed with Gen. Vallejo about this mineral, the nature of which he had not yet ascertained" (p. 1103, Q. 5). Mr. Leese accompanied the party to Sutter's Fort and *there* left them, returning to Sonoma. *After this,* Mr. Leese went to Santa Clara, and was then present at experiments by Castillero resulting in what all persons present treated as the first ascertainment of the fact that the mineral was quicksilver (p. 1102, Q. 4, p. 1104, p. 1105, Q. 9 to 19, p. 1108, Q. 1).

A reference to writings made at and about this time, including the article of partnership itself, will tend to show that the true date of the latter was *Dec.* 2, 1845.

No paper in the record bearing a date anterior to Dec. 2, 1845 (except the article of partnership) speaks of quicksilver.

On Dec. 2, 1845 (the very day when, as is submitted, the copartnership article was drawn and signed, but accidentally *mis*dated), Castillero addressed a letter to Gen. Vallejo, whom he had previously conversed with on Nov.

6. This letter announced as *news* the discovery of *quicksilver*. Its whole tone indicates that Castillero had not previously intimated to Vallejo anything about a quicksilver mine (p. 2603).

Gen. Castro was one of the partners; but he did not himself sign the article of partnership. It was signed for him by Castillero. The cause of this is apparent. Castro parted with Castillero just about the time the quicksilver was discovered. During the whole time from Castillero's first visit to the mine, late in October or early in November, until the return to Santa Clara subsequently to Nov. 12, 1845, Gen. Castro and Castillero were continually together (p. 2633, Q. 124 to 133).

The discussions in California left the District Judge "unable to demonstrate how this discrepancy occurred" (pp. 3485 to 3487). But we think it is here fully accounted for.

Suspicion No. 2.

The counsel representing the Government put into the Record many deeds and documents in order to show that the parties interested in this mine, when contracting about it and selling shares in it, never referred to the Alcalde's Act of Possession as a source of title or mentioned it in any way. It was argued that what they constantly relied upon as their source of title was the article of partnership.

By way of testing the soundness of this criticism, we here set forth a brief abstract of all these conveyances and writings.

June 12, 1846, José Castro, at Monterey, for himself and his partners, authorized Eugenio Macnamara, a priest,

to contract with an English company to work and supply the mine on equal shares (9 and 7) 16 years, or to allow them $\frac{2}{3}$, or to "make other stipulations, with the concurrence of * * Castillero." *See Macnamara's letter of Sept.* 27, 1846 (*p.* 950.) *José Castro's dep.* (*p.* 2614).

Nov. 28, 1846, Macnamara, at Tepic, in Mexico, agreed accordingly with Alexander Forbes, of that city, representing an English company, but at the higher rate of compensation, *i. e.* $\frac{2}{3}$.

Dec. 17, 1846, Castillero, in the city of Mexico, confirmed this agreement, Mr. Negreté acting for A. Forbes in the negotiation.

See these documents, pp. 2454 to 2483.
Translations thereof, pp. 1195 to 1203.
Repeated, pp. 2498 to 2508—2523 to 2530.

The power of attorney to Macnamara as here recited speaks of the mine in this way, *i. e.*, "the three pertenencias which by just title and as discoverers we possess in the mine, &c.; and being favored by the mining ordinances and the respective laws, and more especially by the * law of Oct. 7, 1823, in the procuring of the great advancement and profit in the working of this class of mines; and the mine which we now possess being first, sole and most important for its richness which has been discovered in Mexican Territory." The original was produced (p. 2637 to 2641), and its due execution proven by *José Castro* (p. 2618, Q. 30, 31).

Castillero's ratification, Dec. 17, 1846, recites that "from the document which he presents it appears that as the owner of" the mine, "he executed a contract of partnership," and follows on with a narrative of his (Castillero's) partners' act in constituting Macnamara attorney, and Macnamara's agreement with A. Forbes, setting forth

the documents. There are no words employed which imply that Castillero's title was derived from the article of partnership. On the contrary the articles of partnership are introduced as deriving their force from his ownership. And in this ratification, at p. 1200, Castillero "cedes in favor of the contractors of supply and for the 16 years of this contract, the two square leagues of land of which the Supreme Government has made him a concession," as shown by the Castillo Lanzas dispatch then exhibited, a copy of which was annexed. *See it,* (p. 1202).

Dec. 17, 1846, in Mexico. Castillero to Alexander Forbes, represented in this transaction by F. M. Negrete, cons. $4000. After reciting "that he is owner in fee of twelve barras in the mine," the grantor sells with full warranty "in real sale and perpetual alienation * five barras of the twelve which belong to him in fee in the aforesaid mine of Santa Clara, which he * *acquired as discoverer.*" He also engages that the contract of partnership of Nov. 2, 1845, "SHALL NEVER BE AN OBSTACLE" TO THE SALE. *No other allusion in this paper to the source of title.* He had on the same day exhibited the Castillo Lanzas decree for the two square leagues of land. See previous document on (*p.* 1202).

See this deed, pp. 151 *to* 164.
Translations, pp. 492 *to* 505.

March 1, 1847, (*p.* 492.) Cons. $800, (*p.* 494).
April 12, 1847, (*p.* 495.) Cons. $1000, (*p.* 497).
April 16, 1847, (*p.* 498.) Cons. $1000, (*p.* 500).
March 10, 1847, (*p.* 501.) Cons. $1000, (*p.* 504).

By each of these four instruments, José Castro conveys to Alexander Forbes, of Tepic, Mexico, one barra.

In each instrument, after reciting at length the article of partnership with Castillero, this grantor declares "that by the foregoing and as a shareholder in that mine," he sells one of the four barras which "belonged to him, * free from all incumbrances expressed or implied, as he thus warrants." The grantee agrees to assume grantor's duties as partner. *There is no other allusion to any source of title.*

See these deeds, pp. 151 *to* 164.
Translations thereof, pp. 492 *to* 505.
Testimony of Gen'l. José Castro, p. 2616.
Negreté's letter to A. Forbes, dated Feb. 6, 1846, p. 2497.

Dec. 14, 1847, S. & T. Robles, the partners of Castillero for $3,860, sell and convey to J. A. Forbes "two barras in each of the three pertenencias belonging to the Quicksilver Mine of New Almaden, of Santa Clara, with all privileges, favors, concessions and rewards, that may have been granted to the partners in said mine by the Mexican Government, and in fine every right of any nature whatsoever appertaining to the two barras aforesaid." They grant a "pure, perfect and irrevocable title," free from incumbrances, with warranty of peaceable enjoyment. *There is no reference to any source of title.*

In Spanish, p. 172.
Translation, p. 3356.

Dec. 27, 1847. Padre Real, as attorney for *Castillero* to A. Forbes, consideration, $4,500 (pp. 149, 507).

Conveyance of three barras with warranty. The instrument is quite elaborate and peculiar. No person of skill appears in the transaction (p. 484).

The grantor is called "attorney in fact of Don Andres

Castellero," and "having legitimate power, which he exhibited, from said Castillero, to sell three barras," he sells "three barras of the ten of which he is the lawful owner* which this grantor possessed as discoverer thereof." Engages that "the second article of the agreement of partnership" of Nov. 2. 1845, SHALL NOT BE AN IMPEDIMENT AND THAT HIS PARTNERS SHALL RATIFY THIS SALE. *No other allusion to any source of title.*

See this deed, p. 149 to 151.
Translation thereof, p. 507 to 510.

April 14, 1848, at Santa Clara, S. & T. Robles, by J. A. Forbes, their attorney, for $7,000 convey to Robert Walkinshaw two barras in the "quicksilver mines of New Almaden de Santa Clara," of which they "became part proprietors in Nov., 1845, by grant from Andres Castillero, as is fully set forth in a document" specifying the articles of partnership. *No other allusion to any source of title.*

See this deed, pp. 173, 174.

Aug. 9, 1849, Padre Real to Robert Walkinshaw, consideration $5,000. Grantor, after reciting briefly that by virtue of the partnership articles "there belongs to to him in law, as a perpetual donation, four barras," (three of which he sold to A. Forbes in January, 1848), sells and conveys the other with warranty, Walkinshaw assuming grantor's duties as co-partner. *There is no other allusion to any source of title.*

See this deed, p. 175.
Translation, p. 505.

Aug. 9, 1850. J. A. Forbes to John Parrott for $24,000. Conveyance with warranty of one barra. *No allusion of any kind to the source of title.*

Deed, p. 179.

Sept. 10, 1850. J. A. Forbes to Henry Laurencel for $5,400, quit claim of $\frac{3}{240}$ of one share, or $\frac{1}{24}$th part of mine.

Deed, p. 180.

March 22, 1851. Henry Laurencel to James R. Bolton and William E. Barron, composing firm of Bolton, Barron & Co., of San Francisco, for $3,000, transfers with covenants against his own acts, $\frac{3}{240}$ of one barra. *No allusion to source of title.*

Deed, p. 182.

April 30, 1852. Bolton, Barron & Co. to José E. Fernandez, for $6,000. Conveyance with warranty against own acts, the $\frac{3}{240}$ of a barra. Describes it as the same conveyed by J. A. Forbes to H. Laurencel, and by him to present grantors. *No other allusion to any source of title.*

Deed, p. 183.

April 14, 1853. José E. Fernandez to José Francisco Leon, for $6,000, conveys with covenants against own acts $\frac{3}{240}$ of one barra, tracing title from J. A. Forbes to Laurencel, Laurencel to Bolton, Barron & Co., and from them to present grantor. *No other allusion to any source of title.*

Deed, p. 185.

Aug. 4, 1853. José Francisco Leon to J. A. Forbes, for $8,000, conveys with covenants against own acts $\frac{3}{240}$ of one barra, reciting conveyances. J. A. Forbes to Laurencel, from him to Bolton, Barron & Co., from them to Fernandez, and from him to present grantor. *No other eference to any source of title.*

Deed, p. 187.

March 30th, 1855. J. A. Forbes to William E. Barron, for $35,000 conveys by quit claim one barra. *No allusion to any source of title.*

Deed, p. 189.

May 29th, 1855. Same to same, another quit claim of same barra, with this addition, "including all my right, &c., to the tract of land granted by the President of Mexico to Andres Castillero on the 20th May, 1846, described in the order or decree issued by the Minister of Foreign Relations on 23d May, 1846, and directed to the Governor of California, being two leagues of land." *No allusion to any source of title to the mine.*

Deed, pp. 190, 512.

Nov. 27th, 1852, Dec. 7, 1852, at city of Mexico. Yecker, Torre & Co., of Mexico, to Barron, Forbes & Co., of Tepic, consideration $380,000. Sale without warranty of $3\frac{1}{2}$ supplying shares, and 4 and $\frac{11}{14}$ of the shares supplied in this mine, and grantors' share in the commercial house of Bolton, Barron & Co., of San Francisco, also 10,000 quicksilver flasks. *No allusion whatever to source of title.*

Deed, pp. 192 *to* 197.

Translation, pp. 514 *to* 519.

It is quite true that none of these deeds refer to the Alcalde's Act of Possession, or the registry, or denouncement, as a source of title. But is this remarkable? On the contrary, would it not be very remarkable if they had referred to it in that way?

1. It is by no means an invariable practice of conveyancers to specify, or refer at all to the source of the grantor's title. The practice is rather the other way.

2. Even when the grantor's source of title is specified, it is quite unusual to trace its *pedigree* further back than to the *immediate* source or parent.

Both of these well-known facts are well illustrated in the deeds just abstracted.

Many of them were executed after the filing of the present claim, on September 30, 1852. And, although the registry or denouncement and Act of Possession,

are recited in the claim and thus put on record, yet not a word is said about them in those conveyances so subsequently executed.

3. The only instances in which the article of partnership is referred to, *as a source of title*, is where Castillero's partners are grantors. And there, though not necessary, it was quite proper and agreeable to an usage of some draftsmen.

The article of partnership was, in point of fact, the source of title to *these* grantors. Castillero had the original title to the whole mine by discovery, registry or denouncement and juridical possession. And, by the article of partnership, he conveyed to these grantors, as his partners, their respective shares or *barras*. For him to refer to the article of partnership as a source of *his* title, in the opinion of Mr. Randolph, "would have been unlike a man of intelligence" (p. 2432, Q. 180, 181). He never did so.

4. Castillero himself, when referring in his conveyances to the article of partnership, does so only for the purpose of introducing a covenant that it does not or *shall not constitute an obstacle* to his grant. He never referred to it as a source of title in him. On the contrary he expressly declares that "he *acquired* the mine of Santa Clara, as *discoverer*" (p. 1203).

It has been seen that J. A. Forbes by deed, dated Sept. 14, 1847, bought two shares or *barras* from S. & T. Robles, two of the partners (see deed, p. 172). J. A. Forbes drew that deed himself (p. 451). It refers to no source of title. He testifies thus: "In that transaction I was guided by the contract of company of Castillero and his associates, *and by the notorious fact of his having received a possession.* I made out the deed according to the usual formula of Mexican documents" (pp. 451, 465. See further pp. 454 to 456).

This review of the conveyances would seem a per-

fect answer to any attempt to draw an inference from the form of them that the registration or denouncement and Alcalde's act of possession were not in existence at their dates.

Yet it would seem that the learned judges of the District Court were not perfectly satisfied on this point. Let us therefore look into it a little further. We have seen that Mr. Negreté of the city of Mexico, in Dec. 1846, negotiated on behalf of Alexander Forbes of Tepic, in procuring from Castillero a ratification of the *Avio* and a sale of five shares or *barras* in the mine to A. Forbes.

Mr. Negreté was produced in California as a witness, in Sept. 1859 (p. 2394). *Fuentes*, who had acted as Notary in these transactions, having died, his notarial record was proven by *Villalon*, a witness, examined Oct. 11, 1859. Traced copies of the original notarial record were produced.

Testimony of Francisco M. Negreté (pp. 2394 to 2440).

Exhibits annexed, Nos. 1 *to* 20 (pp. 2441 to 2483).

Translations thereof (pp. 2484 to 2530).

Testimony of notary Francisco Villalon (pp. 2553 to 2596).

These notarial documents had been previously proven in the year 1858 by *Mr. Forsyth* and *John P. Brodie*.

Testimony of Mr. Forsyth (p. 1112).

" " *J. P. Brodie* (p. 1061, Q. 6, 7).

Documents of notary Fuentes (pp. 1145 to 1160).

Translations thereof (pp. 1195 to 1210).

In connection with this criticism as to the non-production of the Alcalde's act by Castillero, or the non-reference to it by him in his dealings, *Judge Hoffman* says:

" But the circumstance that I have found most difficult to account for, and which most strongly suggests suspicions as to the genuineness of the Act of Possession, is the failure

of Castillero to exhibit or even mention it, during his protracted negotiation with Mr. Negreté." (pp. 3487, 3488.)

It does not appear that A. Forbes had the slightest doubt of Castillero's title, or directed any inquiry on that subject; but the contrary (p. 2426, Q. 164 to 167—p. 2435, Q. 192—p. 2437, Q. 202). Negreté formed the highest opinion of Castillero's probity (pp. 2495, 2492, 2497, p. 2428, Q. 169—p. 2432, Q. 180). And, though he employed Mr. Romero, a lawyer, to superintend the transactions, the point in view seems to have been, not an investigation into Castillero's title, but to have the papers by which he, Castillero, was to ratify the *Avio*, and sell the *barras*, properly drawn so as to bind Castillero (p. 2433, Q. 183). Nor does there seem to have been anything deserving the name of a "protracted negotiation" (p. 2395, Q. 12, 13—p. 2424, Q. 160).

See Negreté's letters (pp. 2485 to 2497).

Nothing in the very rough cross-examination of this witness implied a doubt that Castillero then claimed to hold the mine itself by virtue of some title given him by the mining tribunals, irrespective of the two-league grant. On the contrary, Mr. Randolph avowed the point of his inquiries to be respecting the genuineness of the two-league grant. For instance, Mr. Randolph says (p. 2422, Q. 154):

"As there is no question raised in this case as to the truth of the allegation that Andres Castillero sold some *barras* to Alexander Forbes; but *only as to the* genuineness of that grant of two leagues as it now appears incorporated in the act of sale, how does it happen, &c."

The style of inquiry touching the Act of Possession, referred to its extravagance in granting so much land rather than to any doubt of its existence, and amounted to a sort of lecture to the witness for doing his business so loosely (pp. 2432, Q. 179 to 191).

Besides, it is to be observed that *Negreté* only says

that he does *not remember* having seen the Act of Possession (p. 2432, Q. 179), and he does not say that he ever "asked" Castillero "for his title" (p. 2432, Q. 181). That was no part of *Negreté's* duty.

And he distinctly says, on p. 2438, in answer to Q. 204: "Mr. Castillero made certain statements to me in regard to some documents concerning concessions which he had received from the mining tribunals, which statements I also communicated to Mr. Forbes. What these documents were or what they contained I never knew. My only knowledge of them was from this statement of Castillero." It is, we must admit, quite possible that, in this answer, Mr. Negreté referred only to copies of the transactions before the *Junta de Fomento,* which Castillero spoke of getting; but seems to have neglected (p. 2437, Q. 202).

It is not easy to perceive how it is to be inevitably concluded that Castillero did *fail* to *mention* the Alcalde's Act in these conversations, or even that he omitted to exhibit it, especially when it is considered that the witness' attention was not, at the time, drawn to any question of title; that he avows total ignorance of mining matters, and had a disrelish for that kind of investment (p. 2494, 2487). Besides he was speaking of transactions and conversations which had occurred 13 years previously to his examination.

The motive for taking special notice of the article of partnership is distinctly stated by Mr. Negreté in his letter of December 16, 1846, and recorded by the notary.

Negreté says: "Senor Castillero engages that his associates will consent to the sale of these shares; and, if they do not, he will pay you their cost out of the proceeds of the twelve shares belonging to him" (p. 2491). And in the Notarial Act of Sale, dated December 17, 1846, he agrees that said Article "shall

never be an *obstacle;* for he binds himself to make his partners agree and consent to it," &c. (p. 1204).

And finally, let it be observed, that Mr. Romero, the Mexican lawyer, would have displayed ignorance rather than learning or technical accuracy, had he referred to Castillero's registry as the source of *his* title. The *source of his title* was discovery, and to that Romero did refer (p. 1203). The registry and juridical possession were merely formal observances to secure the title by discovery, which must have previously existed.

Besides, though Mr. Negreté may never have known the fact, or may have forgotten it, it is fairly to be presumed that Castillero, at the very commencement of this negotiation, placed in the hands of Negreté his original *testimonio* as received by him from the Alcalde.

See this Brief, p. 90 to 95.

In the above summary of the conveyances, it has not been thought necessary to notice the conveyance taken from Castillero by Mr. Billings, on behalf of his clients, in October, 1856, or the further conveyances by Mr. Billings to his clients in November, 1856 (p. 519 to 523). These were drawn at a late period and with unusual exactitude. They contain an extremely minute statement of the title (p. 364, Q. 195 to 208).

Suspicion No. 3,

Was founded on the simple fact that two attested copies of the articles of partnership existed, both certified on December 8, 1845, one attested by one witness and the other by two witnesses. One of them was produced by the claimant, November 7, 1858, and was certified by both Manuel Castro, the Prefect, and the same Antonio Maria Pico, who had recently been

Alcalde. The Government afterwards, August 6, 1860, produced the other, and proved it (p. 2742, Q. 48 to 54): it was certified by Manuel Castro only.

See Claimant's copy, Exh. C. D. p. 624.

The genuineness of this certificate was directly proven by Alcalde Pico (p. 2742, Q. 48 to 54).

See also testimony of José Fernandez, p, 601, Q. 15.

The Government copy seems to have been produced by Mr. Randolph merely for the purpose of puzzling Alcalde Pico on his cross-examination.

See Government copy Exhibit No. 2 *p.* 2752.
" *translation thereof, p.* 2753.
" *cross-examination of Alcalde Pico, p.* 2742 *Q.* 48 *to* 54.

General José Castro thus testifies as to the original: "I never saw it; but I gave Castillero authority to enter into the contract on my behalf * I learne from him that he had done so, and that the contra was in possession of Padre Real" (p. 2614, Q. 8, p 2634, cross Q. 130 to 133).

Under examination, on December 1, 1859, in *answer to* Q. 32 *on p.* 2619, he gave a hearsay statement of Manuel Castro tending to show that the original had gotten into the hands of Laurencel, the principal promoter of the Fossat claim to this mine, and the client of Mr. Randolph. This, indeed, was objected to by the Government as hearsay; and, perhaps, we cannot insist upon it as evidence.

It is not perceived how any suspicion could arise from the fact that two copies were made, and that one of them had only one certifying witness, whilst the other had two. But the documents themselves explain the transaction and furnish, by their display of that consistency which ever accompanies the several

elements of a historical truth, strong confirmation of the claimant's title.

The seventh clause in the article of partnership runs thus: "This contract shall be ratified in the presence of the Prefect of the second district, Don Manuel Castro, depositing the original document in the archives of that place, and giving a certified copy of the same for security to the parties interested" (p. 2754.)

Two copies, at least, seem to have been thus made. The certificate of authenticity is worded as if but one person was to certify. Probably five were made, *i. e.*, one for *each* partner. The seventh clause seems to contemplate this. It was not singular that Castillero should get the additional attestation of Mr. Pico. And we find that in December, 1846, during his interviews with Mr. Negreté, at the City of Mexico he had his copy thus attested by Pico (p. 2432, Q. 179). One of the other copies was obtained by Mr. Randolph and probably through his client's agent, J. A. Forbes. It had only the attestation of M. Castro, the Prefect, because its owner had not thought fit or necessary to procure any further authentication.

Suspicion No. 4.

J. A. Forbes in April, 1849 (pp. 177, 390, 844, 435, 447, 486), was appointed director of the mine in place of Walkinshaw, who had previously, in the spring of 1847, superseded him in the same office (pp. 383, 447). Walkinshaw now, in August, 1849, surrendered the possession to J. A. Forbes as his successor (pp. 276, 487, 283).

In addition to the rivalry between these men indicated by these circumstances (p. 488), it may here be observed that each of them was, at this time, an owner by purchase of some shares or *barras* in the mine (pp. 172 to 177, 505

to 507, 3356). Soon after Walkinshaw had thus quietly submitted to displacement as director, *i. e.*, in Oct., 1849, he seems to have repented of his easy compliance. With the aid of his lawyer, Mr. Horace Hawes, he instituted sundry suits or legal processes against J. A. Forbes, for the purpose of expelling him.

See the proceedings in these suits, pp. 272 to 286.

The feud thus manifested between these men was conducted with great bitterness. The letters of J. A. Forbes, which are in evidence mainly for other purposes, teem with invectives against Walkinshaw (pp. 393, 844 to 848, 952, 953, 958, 959). *See also* p. 581, § 542. Walkinshaw's conduct was very perverse, and was apparently the offspring of ill-regulated passions. This will be fully seen in a moment.

The record abounds with proofs, which will be seen hereafter, that, at this time and until his death in 1858, Walkinshaw was deeply interested in the maintenance of the Castillero title, and that he never did, at any time, attempt or desire to question its *verity*. Precisely the same relations existed between J. A .Forbes and the Castillero title until he, J. A. Forbes, sold out in May, 1855 (pp. 190, 512, 472).

Yet, J. A. Forbes, after he had been engaged by Laurencel, as heretofore shown, to furnish testimony against the Castillero title, uttered, as a witness, some very loose expressions about Walkinshaw's having "made statements * that there was no title to the mine" (pp. 480, 481, 487, 488).

And to help this suggestion *H. C. Melone*, the clerk of the court in which these Walkinshaw and Forbes litigations of 1849 were conducted, was thus interrogated (pp. 270, 271).

"*Q.* 61.—During the suit of Walkinshaw and Forbes, and the denouncement by Horace Hawes, of which you have

testified, or at any time before the division of the archives, of which you have also testified, did you ever hear Forbes or Walkinshaw say that there was any record of the denouncement and possession of the mine of New Almaden, among the archives in your charge? Did they never ask you to search for such record among such archives, or ask your permission to search there for it themselves?

"*A.* 61.—I do not think that they ever did. I think they never asked me to search, or asked permission to search, for them."

Now it will be seen that so far from impeaching the Castillero title or questioning its *verity*, *all* the proceedings of Walkinshaw were actually based upon that title and expressly admitted its existence.

He sought, in the first place, to impeach the alleged right of J. A. Forbes, to take from him, Walkinshaw, the possession of the mine. That is to say, he denied the due appointment or installation of J. A. Forbes as his successor in the direction of the mine. By way of having two strings to his bow in this conflict, he did a thing which, indeed, questioned the *validity* of Castillero's title. He sought indirectly—using the name of his attorney and agent—to denounce the mine as forfeited by Castillero and his grantees in consequence of their abandonment of it or neglect to work it. But this also was, of course, an express admission that that title existed.

Walkinshaw's first petition in these proceedings against J. A. Forbes, dated Oct. 18, 1849, states "that by title derived *under the original act of registry*, he is the owner of $\frac{1}{8}$" of the mine (p. 272). His petition, dated Sept. 25, 1849, asserts his "possession by virtue of his own right and interest, and the consent and agreement of all the other parties interested therein" (p. 279).

In the course of this feud, Oct. 6, 1849, Walkinshaw's lawyer (p. 292), Mr. Horace Hawes, denounced this mine under the mining ordinances, before an Alcalde, for desertion or neglect to work it. Notices were issued and a

hearing had, and the case was dismissed for want of jurisdiction. See proceedings, pp. 287 to 304.

1. So far from questioning the facts now relied upon by the claimant, this proceeding was founded upon and affirmed them.

Hawes describes the mine as "known in its original title of registry as that of Santa Clara, and now by the name of New Almaden;" names Castillero and his associates as the "last possessors," and founds his denouncement on their having "left" it "without having been worked for four consecutive months" (pp. 287, 288). See pp. 291, 299. The notice or proclamation in like words refers to "its original act of registry" (p. 297).

2. *James M. Jones* was counsel for J. A. Forbes in resisting this manœuvre. He took, we need not ask how wisely, an exception to the jurisdiction, which, if well-founded, might equally affect, not indeed the *existence*, but the *validity* of Castillero's original registry, and, consequently, might in some other case destroy his own client's interest. But it answered the present purpose. It led to a dismissal of Hawes' proceedings. This exception was that "the ordinances establish a special and exclusive jurisdiction in another Court, and provide, that in default of such Court, the party should go before the Court of the nearest Territory."

See the Exception and the Judge's opinion (p. 301).

Up to this point in the proceedings, Mr. Hawes had satisfied himself with going upon a *denouncement* for desertion "pure and simple" (pp. 287, 288). But when he found his suit dismissed, he drew up in writing a strong protest against the decision. In this a further and additional ground of objection to the Castillero title was presented. But this new and additional ground affords new

and additional evidence of the *verity* of the Alcalde's Act of Possession.

Hawes' Protest alleges "that the former owners or possessors of said mine have, in every essential particular, failed to comply with the conditions under which they first obtained possession of said mine, whereby they have lost all right thereto, and, furthermore, that by reason of the *insufficient registry* and non-compliance *originally* with the requisites prescribed by law, * * they never acquired title. * * All of which facts the said Horace Hawes now stands here in court with the witnesses, *documents, and* records, offering to prove and substantiate in due form of law" (p. 299).

Suspicion No. 5.

This is founded on an affidavit made by General Halleck, whilst he was Director of the mine, and nominally one of the counsel for Castillero's grantees.

Here it is necessary to give some further account of the Berreyesa claim. In December, 1845, when the Alcalde's Act of Possession was made, Berreyesa, a Mexican, residing in the neighborhood, asserted that his ranch covered the mine. Under the Mining Laws of Mexico, it was a matter of little importance whether the limits of Berreyesa's ranch did or did not include the mine; and, accordingly, as we have already seen, the Petition of Castillero, as well as the Alcalde's Act of Possession, state the mine to be "situated on the rancho of the retired Sergeant Berreyesa" (pp. 75, 76).

On December, 10, 1845, Castillero, at the Mission of Santa Clara, addressed a letter to *Pio Pico*, Governor of the Department of Californias, announcing his discovery, &c., and asking "that the vacant lands *near* * be conceded to "the company he had formed, "to cut wood" (p. 1806).

He had also in December 1845, sent to the Governor, through Manuel Castro, the Prefect of the District, a petition "soliciting a piece of land of two square leagues * adjacent to the said mine."

Testimony of Pio Pico, p. 2532, Q. 9, 10, 11.
Documents annexed, p. 2550.—3068.

Castillero was no doubt misinformed by Berreyesa, for, says Judge Hoffman at p. 3499, "It is to this day unsettled whether, in fact, the mine is within the boundaries of Berreyesa, or those of his neighbor, Justo Larios, or without both, on public land."

The Government exhibited in this case the *espediente* or recorded title asserted by the Berreyesa family (pp. 787 to 793). By this the following facts appear: On June 11, 1842, he petitioned Governor Alvarado for a grant of the ranch occupied by him, desiring *two* leagues (p. 788). Disputes as to boundary existed between himself and his neighbor, Justo Larios; and this application eventuated in the tender of a grant to Berreysa for *one* league on August 20, 1842 (p. 791, sec. 3). He refused to accept this grant, and on Feb. 10, 1844, petitioned Governor Micheltorena for a new grant with boundaries specified in the petition. This description winds up thus: "Which contains in length two sitios (leagues), a little more or less, and, in breadth, it has not a quarter of a league in the widest part even" (p. 792). After certain official inquiries touching the dispute between Berreyesa and his neighbor, Larios, about their boundaries, the Secretary reported that there appeared to be no objection to extending a *new* title to him [Berreyesa]; and on July 23, 1844, Micheltorena signed an order in these words: "Let it be issued." There is no evidence that any document was issued, or that any other proceedings were had (p. 793).

This Berreyesa was killed about June, 1846 (p. 2728).

After said Berreyesa's *espediente* had been thus put in evidence in this case by the Government, the claimant's counsel produced a paper bearing date Nov. 20, 1844, purporting to be a copy of a grant by Gov. Micheltorena to Berreyesa in due form, for "two square leagues, a little more or less" (p. 2730, § 4).

This paper was proved to be entirely in Berreyesa's handwriting, but the Government objected to its introduction as *immaterial* (pp. 2728, 2741). Berreyesa, we have seen, was present when Castillero took juridical possession and represented that he owned the land (pp. 2735 to 2740).

There is every reason to believe that this assertion of Berreyesa was false and fraudulent.

The alleged original title paper, of which a pretended copy was thus made by Berreyesa and presented to Castillero to verify his assertion, has never been produced to the courts as evidence of title. The Land Commissioners, the District Court and this Court have concurred in confirming the claim, but only to *one* square league.

U. S. v. Berreyesa's heirs, 23 *How.* 500.
Answer in Tobin v. Walkinshaw, pp. 559, 560. § 4.
Letter of J. A. Forbes, p. 543.
Letter of Castillero, Jan. 14, 1847, p. 3049.

On 10th December, 1845, when Castillero applied to the Governor of Californias for a grant of "the vacant land *near* our works to cut wood" (p. 1806), he would seem to have labored under the delusion produced by Berreyesa's false representation.

Whether he had heard from the "*colindantes*," i. e., adjacent proprietors (p. 3049) anything to induce a doubt on this point as early as December 30, 1845, the date of his juridical possession, must be a matter of speculation. There is no positive proof.

The Alcalde's Act describes the *mine* as *on* Berreyesa's ranch; yet it grants to Castillero land to the extent of 3,000 varas in every direction—nearly as much as Berreyesa's whole ranch, even if it amounted to two square leagues. It is possible that Castillero had then heard enough to produce a disbelief of Berreyesa's assertion, and he may yet have thought it best that his locative description of the *mine* should correspond with the original representation; it being perfectly immaterial, in point of law, as it respects the *mine*, whether it was on private or public land.

By May 12, 1846, when Castillero was prosecuting in the city of Mexico, his application to the public authorities, it is quite clear that he had arrived at a conviction that Berreyesa did not own the land in which the mine was discovered. His written application to the Government was for a grant of "two square leagues of land [not "*near*" or *adjacent to* but] "ON the land of [his] mining possession," for wood to be used for his burnings (p. 1802, Art. 8).

And, if we look back to the wording of the Act of Possession, drawn up 30th December, 1845, we find that language to the same effect was then employed. In both instances it may be thought that there is a complete departure from that deference to Berreyesa's pretended title which characterizes Castillero's previous application to the Governor of California on December 10, 1845 (p. 1805—p. 3068, §§ 3, 4).

For the purpose, as is supposed, of basing upon the affidavit of Gen. H. W. Halleck, hereafter stated, a presumption that Castillero's title-papers were of recent fabrication, the Government put in evidence the pleadings and part of the proceedings in certain suits, brought in 1850, by Berreyesa's widow and heirs and their lessees, as plaintiffs, against Castillero's grantees, to recover said mine as lying within the Berreyesa ranch, and for

damages. These papers occupy the *record from* p. 199–251.

The bills state that Roman, Hepburn, Stuart, and Thorn, on July 12, 1850, took from the Berreyesas a 20 years' lease of the mine (p. 200). The answer shows that previously to that, and prior to November 7, 1849, one Shillaber had entered into a similar speculation (p. 212, 218).

At a subsequent stage of the case, and on the cross examination of J. A. Forbes, the claimant's counsel offered parts of a sworn answer put in by him on 11th February, 1856, to a suit in equity brought by one *Tobin*, to establish this same claim of Roman *et al.* under the lease of July 12, 1850 (p. 564), and for an injunction. The counsel for the Government required the whole answer to be put in, the claimant's counsel assented, and it was put in accordingly (p. 472 *to top of* p. 474).

The said answer of Forbes and Walkinshaw contains a very complete and yet brief history of the efforts of the Berreyesa family and of their said lessees to establish the point that this mine fell within the limits of the Berreyesa grant (pp. 557–599). And it also sets forth the particulars of Berreyesa's fraudulent representations as to the extent of his grant, and of Castillero's discovery, soon after, that Berreyesa's story was false (pp. 557–599).

We now return to the suit of Berreyesa's heirs, &c., and their lessees in 1850, and the affidavit of General Halleck made therein to bring into view this *Suspicion No.* 5, and to present the evidence in answer to it.

The same J. M. Jones who in Oct., 1849 (*see this Brief*, p. 61), as counsel for Castillero's grantees in the matter of Mr. Hawes' attempt to *denounce* their mine for desertion or negligent working, had set up that an alcalde had not jurisdiction in such matters under the mining or-

dinances, was now, Sept. 13, 1850, engaged as counsel in this suit for the Berreyesa claimants against the title he had formerly been retained to protect. Perhaps it was with a view to raise the same point, though this is not clear, but at all events he prayed for an order of court that defendants, i. e., Castillero's grantees, exhibit in court their title papers, reciting each of them by a somewhat general description, swearing "that the exhibition of said papers in court, if any such exist," is "necessary to the prosecution" (p. 226). Whilst the whole tenor of this application and every word in it sounds in a call for the originals, or to speak more accurately, the very papers which were relied upon by Castillero's grantees for *proof of title*, the order, as copied into this transcript, closes thus: "which motion is granted by the Court; and the said papers *or copies thereof* are ordered to be produced accordingly" (pp. 225, 226).

Gen. Halleck, though a lawyer and one of the law firm then defending that action, had no interest in the law business done by said firm for these parties: his partners Peachy & Billings, were their counsel. Nor did he as either attorney or counsel act further in that law business than any client might incidentally aid his counsel if equally capable. Gen. Halleck was at this time director of the mine and superintending agent of the operations thereof on behalf of Castillero's grantees.

See Halleck's testimony, pp. 325 to 331.

On Dec. 23, 1850, Gen. Halleck verified a paper in said Berreyesa's suit, which is mainly devoted to procuring a postponement of the trial for the reason that the defendant's title papers, reciting them in detail and other documents (meaning of course the probative documents) necessary to the defence were in Mexico, and had been written for but had not as yet been received. This paper, however, was made to perform another part. It began "in answer to the order of Sept. 13, 1850, requiring these defendants

to produce in court certain papers upon which they intend to rely as a defence in this cause" (pp. 232, 233).

The affidavit of Gen. Halleck is now greatly relied upon as evidence not only that the original documents of the Alcalde's Act of Possession, since produced and alleged by the claimant to have been always in California, did not *then* exist, i. e., on Dec. 23, 1850. And, to emphasize this negation, it is suggested that even a copy did not then exist and could not *then* be produced.

1. Looking back upon the career of Lawyer Jones (p. 350), with all the lights which this record affords, it can readily be seen that, possibly, *copies* might have answered his purpose, or at least *one* of his purposes; but there is no evidence that the then counsel for Castillero's grantees had any circumstantial knowledge of the proceedings in the cases of Walkinshaw v. J. A. Forbes or the Hawes denouncement (p. 350, Q. 111).

See the account of them in this Brief, p. 60 to 62.

2. The order of Sept. 13, 1850, so distinctly calls for the originals that one might fairly suppose the words "*or copies thereof*" to be a subsequent interpolation. And the whole answering document, signed by Gen. Halleck, is framed as if the responding writer never saw the words "*or copies thereof*" (p. 341, Q. 65). Besides, Mr. Jones, the then antagonist's counsel, contented himself with the answer so given, though it plainly referred only to originals. He, Jones, never excepted that there was no answer at all to his demand *for copies*.

3. Gen. Halleck was fully examined and not very kindly cross-examined. He testified that though he had before that time seen copies, he had not seen any *original* as he understood that term, or in other words any *copia autorizada*.

Testimony of H. W. Halleck, pp. 325 to 374. And especially p. 338, Q. 43, 44, p. 340, Q. 54 to Q. 106.

The learned judges in the District Court appear to have supposed that Gen. Halleck testified, as upon his own knowledge, to facts of which he knew nothing except from the representations of James Alexander Forbes, thus making that individual the scape-goat of an imaginary offence by Halleck. Nevertheless, they deemed the omission to furnish *copies*, or this supposed denial that *copies* existed, insufficient to countervail the strong proof furnished by the claimant.

See Opinion, pp. 3483, 3484.

This is not just toward Gen. Halleck. It is, probably, unjust even to J. A. Forbes.

In the first place the response runs in the defendant's name, and Gen. Halleck's verification of it is simply that he "*believes*" it (p. 233). So, no undue liberty was taken with the solemnity of an oath. Besides, at that date J. A. Forbes had long ceased to be Director of the Mine, and had long ceased to be custodian of its papers. It is not probable that Gen. Halleck acted on *his* representations. The truth of the case is Gen. Halleck supposed that he was responding about *originals*, the word "original" occurring three times in the single sentence which enumerates the papers referred to (p. 233).

Suspicion No. 6.

It was insinuated that the Alcade's Act of Possession must have been a recent fabrication by reason of apparent discrepancies between itself and certain papers supposed to be copies of it. An inquiry into this charge covers the whole term of official *custody* from Dec. 1846. And it was treated by the claimant as calling for the best evidence in his power as to that custody.

Under the mining ordinances a larger amount of surface might be claimed as a mining possession when the

discoverer or owner formed a company to work it. And in this connection, considerable testimony may be found of conflicting opinions and vague ideas touching the number of *pertenencias* of which this mine consisted.

See p. 2616, *and elsewhere.*

In April, 1846, Gen. José Castro sent Castillero to Mexico with a military despatch (pp. 2612, 2635).

A day or two previously to his departure, Castillero drafted a petition to the Alcalde showing the existence of the company to be "attached to the *espediente* of the denouncement" (p. 794), in order to secure the right to these additional *pertenençias* (p. 2628). Gen. Castro, expecting Castillero's return, omitted this formality until June 27, 1846. He then had it copied, signed it and sent it to the Alcalde (p. 2615). He was then about to engage in military operations (p. 2626, Q. 72 to 75—p. 2628, Q. 85—p. 2632, Q. 113 to 117).

In the Alcalde's *espediente,* as found in the office of the recorder of Santa Clara county, this petition of José Castro was in point of order or location the *first* paper.

See Alcalde's espediente (pp. 257 to 259).

Translation of same (pp. 794 to 796).

When originally proving this paper before the land commissioners, the claimant's counsel put into the record as evidence merely the original act of Nov., Dec. 1845, omitting Castro's petition. The latter was deemed wholly unimportant.

See deposition of *Frank Lewis*, who produced it and verified the copy, being exhibit A. P. L. (pp. 28, and 73, 74).

When subsequently the charge of fraud was made, the government's counsel produced the original from the recorder's office, and Yoell, its custodian, and went through a most elaborate investigation of it, water marks and all (p. 254, 674). He recalled Frank Lewis

and interrogated him about his having testified to a copy of part of a paper. The witness answered, fully exculpating himself (pp. 318, 319. *See Halleck's testimony*, p. 356, Q. 144).

The transfer of Spanish papers from the Alcalde's offices after the change of government, had led to some confusion (p. 812, *exhibit No.* 5, *testimony of Yeates*, p. 770, Q. 2, p. 168, Q. 27, p. 145, Q. 10); and an effort was next made to create suspicion that this paper had not always remained in the public offices. On this point the evidence in the affirmative does not fall short of positive certainty.

We have called this paper the *Alcalde's Espediente.* For distinctness sake, we shall uniformly give it this name. As found, its endorsement when produced, was "*Posesion de la Mina de Sta. Clara, Año de* 1845" (p. 322, 353).

Its original is R., No. 1, *at* p. 257.

Its translation is—at p. 794.

The testimony as to its official custody is as follows:

First. Alcalde Pico's official secretary, Jose Fernandez testified that Gutierrez, the clerk or copyist, who wrote Alcalde Pico's Act of Possession, brought it to him in the *Juzgado* in 1845. "He" (Gutierrez) "said to me: 'Now it is all finished, here is the fee; and he gave me three dollars and a half, and so the document remained in court." (p. 602 Q. 18 to 22—p. 606, cross Q. 15, 16, 22 to 33, 42 to 51.)

Secondly. Alcalde Pico's term of office expired at the end of 1845, and he was then succeeded by Dolores Pacheco as first or chief Alcalde (who died about 1855 p. 665, Q. 5). Pedro Chabolla, or Chaboya, or Chavoya was second Alcalde (p. 665, Q. 4—p. 809, exh. 2). And during the first or early portion of his

term, Pacheco was sick, so that his duties devolved upon and were executed by Chabolla.

Testimony of José Fernandez, official secretary of Alcalde Pico in 1845, *p.* 599, *Q.* 6, 7, 8, *cross Q.* 21, 61, 62.

Testimony of Salvio Pacheco, official secretary of the Alcalde in 1846, *p.*665, *Q.* 4, 6—*p.* 666, *cross Q.* 6, 7, 14, 15.

Testimony of Alcalde P. Chabolla, p. 2806, *also p.* 2808, *Q.* 18, 19, 20.

The government put in evidence from the Archives of the city of San José, hereafter more particularly described, certain official acts in the denouncement of mines, &c. performed by Dolores Pacheco, as Alcalde, in March, April and June, 1846 (pp. 816 to 820).

Salvio Pacheco was the last secretary to the Spanish Alcaldes of San José. He testified as follows:

In June or July, 1846, Gen. José Castro, then being" in Santa Clara, "retired" to "the South with the people * * The Americans arrived soon after * * The Yankees * * 15 armed men * * took the office and the papers." Castro had left "Pedro Chaboya and Valentine Higuera * * in charge of the administration of justice * * as 2d and 3d Alcaldes. Chaboya fell sick and Higuera became Alcalde in his stead. The Americans arrived soon after and I delivered the house and archives to the American government."

The "successors" of Dolores Pacheco "were the Yankees when they took the place in 1846."

Testimony of Salvio Pacheco, pp. 664 *to* 669.

It is not difficult to fix the precise time when the Mexican Alcaldes were displaced by the American officials.

The first act of Congress relative to California was that creating it a collection district, passed March 3, 1849 (*9th Stat. at l.*, p. 400). But on August 17, 1846, Commodore Stockton, by the title of "Comman-

der-in-Chief and Governor of the Territory of California," issued a proclamation to the people, announcing the conquest, and that until new forms should be devised and established, "the people will be permitted, and are now requested to meet in their several towns and departments at such times and places as they may see fit, and to elect civil officers *to fill the places of those who decline to continue in office*, and to administer the laws according to the former usages of the Territory. In all cases where the people fail to elect, the Commander-in-Chief and Governor will make the appointment himself." Five days afterwards, August 22, 1846, he appointed September 15, 1846, as the election day for Alcaldes and other municipal officers to hold for one year.

Executive Doc. No. 60; 30*th Cong.*, 1*st Sess.*, pp. 267, 268.

The Government put in evidence a document from the archives of the city of San José, purporting to be an inventory of the archives and property of the Jusgado, as taken possession of by Juan Boston, November 10, 1846 (pp. 810 to 812). This we submit must mean Burton, the first American Alcalde; and it fixes the date left somewhat uncertain by the testimony of the Spanish Secretary Pacheco.

Chapman Yeates, clerk of the Board of Trustees of the city of San José, having in his official possession papers that had "accumulated under the Government of the Alcaldes of the Pueblo," being "part of the Archives of the city" (p. 770, Q. 4; *see* also exhibit 5, p. 812), produced on January 30, 1858, an inventory of "furniture, books, and other documents, pertaining to" the Alcalde's court, bearing date January 2, 1846, signed by Alcalde Pico, with a receipt bearing the same date, at the foot thereof, signed by Alcalde Pedro Chabolla. This was quite minute and particular,

and contained 80 distinct lines or items of single things or classes. The 26th was described in these words:

"1 Posecion de la Mina de Sta. Clara á D. Andres Castillero."

See Testimony of C. Yeates, pp. 769 to 771. Document, p. 807.

Third. At a very late period of the case, *i. e.*, in 1860, there was found in private hands a copy of Castellero's two representations made November and December, 1845, certified by the said succeeding Alcalde Chabolla on January 13, 1846. It was fully and positively identified and proven.

See this Brief, pp. 82 to 90.

Fourth. On Nov. 6, 1857, the claimant produced a copy of the Alcalde's *Espediente* certified August 13, 1846, by Pedro Chabolla, Alcalde. It was in the handwriting of the secretary, Salvio Pacheco.

See it, Exhibit A. B., p. 622.

Its genuineness was fully verified by:

Testimony of José Fernandez, p. 600, Q. 13.

Testimony of Salvio Pacheco, p. 664, Q. 1 to 3.

On the margin of General José Castro's petition of June 27, 1846, there was a decree or order purporting to be made by Dolores Pacheco, who was Alcalde at that date, to this effect, "Pueblo de S. José G., June 29, 1846. Let this be included and archived as the party requests. Pacheco."

See Exhibit R. No. 1, p. 257, also p. 622.

See Translation, p. 794.

Before any suggestion of fraud was made, this Dolores Pacheco died; but his brother, Salvio Pacheco, who at the date of this decree was his clerk or secretary, testified that the body of this marginal decree was written by himself, Salvio Pacheco, and that the signature "Pacheco" was that of his brother, the deceased Alcalde. (p. 665, Q. 4, 5, 6—p. 668, Q. 19 to 21.)

And this same witness, Salvio Pacheco, testified that at the time of its date, *i. e.* in August, 1846, he as secretary wrote out for certification by Alcalde Chabolla, this copy of the Alcalde's *espediente*, which of course included this very marginal decree.

See it, Exhibit A. B., p. 622.

Testimony Salvio Pacheco, p. 664, Q. 1 to 3.

The papers themselves show the truth of this statement. This copy of the *espediente* had the flaw which was characteristic of the *record* duplicate, *i. e.* the day of the possession "30th" was left blank.

See this Brief, p. 82 to 90.

And this, too, notwithstanding the fact that Castro's petition specified the date. (p. 794.)

This paper being very nearly a cotemporaneous certified copy of the Alcalde's *espediente*, as subsequently found in 1851 in the Recorder's office, presents a very striking proof of the genuineness of that paper.

The date was in blank, thus Dec. 1845."

It exhibited that other feature, found in the filed *espediente*, which had excited so much attention, p. 255.

The José Castro petition, though posterior in date and in its origin, was placed first among the papers forming the *espediente*, pp. 257, 622.

Testimony of Frank Lewis, p. 318, Q. 8, 9—p. 254, Q. 13.

Besides, there was a mistake of the copyist in making this certified copy of August 13, 1846, which was somewhat impressive as identifying this copy as a direct transcript from the paper which was filed. In Castillero's first representation the date was written somewhat peculiarly, thus:

"22 de 1.845."

The copyist of August 13, 1846, omitted altogether the first figure of the year, writing the date thus, "de 845." His purely mechanical and unreflecting course in the transcription is shown by his omission to fill up

the date of the act. He had that date before him in Castro's petition.

The materiality of these slight circumstances will be shown by and by. We present this copy in this place merely as an item of proof to the point that the Alcalde's *espediente* existed in the *Jusgado* in 1846.

Fifth. "The first person made Alcalde of San José by the Americans (after the events of June or July, '46, above described by Salvio Pacheco) was called Captain Burton," (p. 611, Q. 62). The witness Chapman Yeates, also, produced from the same archives of the city of San José the record of a suit in March and April, 1847, before this Alcalde Burton, brought by G. C. Cook, who acted for the Justos Larios claimants, complaining "that Andreas Castillero, James Alex. Forbes, José Maria del Ecul, José Castro, Secundino Robles, and Chota *alias* Theodore Robles, were to work on his land contrary to law, and" praying "that they be removed." Appearance of parties survey of "the mines" ordered, had and reported to the Court. Thereupon there was a stay of proceedings at cost of plaintiff.

Exh. 6, p. 815. *Yeates test'y*, p. 771, Q. 3.

Yeates, also, produced from said Archives a letter of counter complaint for trespass, from J. A. Forbes, one of said defendants, to the same Alcalde Burton, dated Aug. 14, 1847, alleging that Cook's workmen had commenced "digging a pit * within the limits of the juridical possession of * the quicksilver mine of Santa Clara." It prays "measures for protecting the rights of the owners of the said mine and those who are legally interested in the same." It says to the Alcalde, "I refer you to the documents which exist in your office upon which was founded your conviction of the justice of your decision in relation to the claim of Mr. Cook in March last."

Testimony of C. Yeates, p. 770, Q. 3.
And Exhibit 3, p. 810.

The Government proved that these controversies did, in fact, exist at the very time, *i. e.*, 1847.

Testimony of Isaac Branham, p. 986, Q. 9 to 21.
See also J. A. Forbes' letter, May 5, 1847, p. 843, *showing he had read the record.*

Sixth. In 1848, James W. Weekes, a dram-drinking American sailor, ignorant yet intelligent, simple-minded and honest, to whose acts the record makes frequent reference, was Alcalde of San José (p. 484, p. 311, Q. 51). When produced as a witness for the United States, he testified that he saw this Alcalde Pico's *espediente* in the office during his own term and also during the time of his predecessor Burton (p. 310, Q. 42, 307, Q. 13, 15, 17, 18, 35, 42 to 44).

He could not be positive as to its absolute identity; but it was produced to him and he asserted his belief quite confidently.

Seventh. In 1849, Mr. May was 1st Alcalde, José Fernandez was 2nd Alcalde. May was succeeded by a Mr. Conroy, José Fernandez still remaining as 2nd Alcalde. José Fernandez testified that during this period he saw the Alcalde's *espediente*. "I saw it in the said Court, but did not examine it; I had it in my hands in handling papers." (p. 603, Q. 23 to 28.)

California was admitted as a State, Sept. 9, 1850; (9th *statutes at large*, p. 452). And consequently, at the end of Alcalde Conroy's term, *i. e.*, in 1850, the Alcalde system was abolished. (p. 604, Q. 34.)

Eighth. Mr. Della Torre, of the city of Mexico, was partner in a mercantile house there. He represented the *Aviadores*. He visited the mine about March, 1850, leaving California in July, 1850. He brought with him certain papers, in Spanish, relating to the mine. When returning to Mexico in July, 1850, he left those papers with Wm. E. Barron, of San Francisco. (p. 338, Q. 43 to 49.)

Mr. W. E. Barron delivered them to Gen. Halleck, then Director of the mining operations, and, in Nov. or Dec. 1850, or Jan. 1851, the latter was engaged in translating them (p. 334, Q. 11, p. 336, Q. 24, 25, 26).

Having previously seen what he supposed to be copies of the Act of Possession, Gen. Halleck, at this time, *i. e.*, the winter of 1850–'51, went to the office of the Recorder of Santa Clara county, to see whether he could there find the Alcalde's Record or *Espediente* (p. 335, Q. 12, 13). It was not found. Gen. Halleck thence proceeded to the office of the Mayor of San José to make further search for it. After half an hour's search or "overhauling" of old Spanish papers in a large desk, the Mayor (Mr. Belden) found it. Gen. Halleck asked for a certified copy; Belden stated that he had "no power to give one, but would transfer it to the office of the Recorder, who could give a certified copy." This was accordingly done upon the spot.

Halleck's testimony, p. 332, 333, 334.

See an elaborate attempt to impeach this statement of Gen. Halleck by cross-examination (p. 343 *and onward*, Q. 72 to 112; *also*, p. 359, Q. 159, 160. *See Re-direct*, p. 372, Q. 1, 2).

Richardson was Recorder at that time. Upon the document there was found, endorsed with a lead-pencil, in Richardson's hand-writing, these words, "Filed 3 o'clock, P. M., 18 January, 1851. J. T. Richardson, Recorder S. C. C." (p. 794.)

Houghton, who had been a deputy in that office in 1852–'53, and again in 1856, and parts of the time after that date, and again when he was examined, Oct. 23, 1857, testified that he "could not state positively either way," but had no recollection of having seen that paper until Feb. 1853. He then found it, as he supposed, "by accident," (p. 324), and, at the request of J. A. Forbes, put upon it, in ink, another file mark, thus: "Filed February

25th, A. D. 1853, at 11 o'clock, A. M. J. M. Murphy, Recorder, by S. O. Houghton, Deputy." (p. 334, Q. 11, 12; p. 796.)

The Government's counsel drew from this witness, testimony that J. A. Forbes had been at the Recorder's office shortly before the time witness found it, inquiring for this paper, had helped to search for it, and that it was not then found. The form of the interrogatories insinuated that J. A. Forbes, at that time, surreptitiously placed it in the office (pp. 322 to 324). This testimony was taken prior to Gen. Halleck's examination. J. A. Forbes himself, when offered as a witness for the Government, and vindictively eager to impeach the claimant's title, even at the expense of his own degradation, gave no evidence in support of this insinuation; but quite the contrary (p. 452).

Frank Lewis took the original with him to San Francisco under a duces tecum, and on March 19, 1855, proved it before Commissioner Lott (p. 28). At that time, "and as matter of prudence," it "was recorded of his own motion) by the Recorder of Santa Clara County" (p. 319). Hence the last official minute upon it, "Recorded, at request of J. Alex. Forbes, at 12 o'clock, M., March 16, A. D. 1855, in book G. of Deeds, on pp. 484, 485 and 486, records of the County of Santa Clara. S. A. Clark, County Recorder, by F. Lewis, Deputy" (p. 796).

The petition was evidently drawn up from what purported to be an exact copy of the Alcalde's *espediente*, as remaining in the *Jusgado*, such copy being certified by Alcalde Weekes, on 20th January, 1848. This fact was rendered certain by the fact that a copy of this last-mentioned paper was annexed to the petition.

See translation of the Weekes' Certificate, Exhibit B in the Land Comm'rs record, p. 3128.

On referring to this copy thus certified by Weekes in 1848, certain marked differences are observable between the original, from which it purports to be taken, and the original *espediente* which we have thus traced, as continually in the Alcalde's office.

First. Each of the two representations made to Alcalde Pico, on November 22 and December 3, 1845, has, at its foot, what purports to be an official certificate of its authenticity as a copy, given by Pedro Chabolla, dated January 13, 1846. We have seen that Chabolla was Alcalde at that date.

Next comes a copy of the Pico Act of Possession, next Pico's receipt for fees, next the Article of Partnership between Castillero, Castro, the Robles, and Padre Real, and lastly, the certificate by Alcalde Weekes, dated January 20, 1848, that the whole "is a faithful copy, made to the letter, from its original, the *espediente*, of the Mine of Santa Clara, or New Almaden, which exists in the Archives under my charge" (p. 78).

It will be remembered that when the original Alcalde Pico's *espediente* of the Mine was brought in from the Recorder's office and proved before the Land Commissioners, so much only of it, as was the record of *that Act* was inserted in the Exhibit annexed to the depositions as a copy. (*See it, Exhibit A. P. L.*, pp. 3165, 3166.)

At the time when attention was first drawn to this discrepancy between Weekes' certificate and the original *espediente* on file, J. A. Forbes was in communication with Laurencel, one of the leading Fossat claimants. He, J. A. Forbes, made it; and he alone, of all the persons then in California, knew or had ever

noticed that it was not an exact copy of the *filed* originals (pp. 452 to 454).

Alcalde Weekes, the signer of this certified copy of 1848, was called by the Government, for the second time, on August 18, 1857.

He testified, to be sure, as before stated, that there was in the Alcalde's office during the term of Burton, his predecessor, and of himself, "a book on foolscap paper, containing the first denouncement of the mine, made in 1845" (p. 307, Q. 15). And on being shown the original document which Deputy-Recorder Yoell had produced from the Recorder's office, he testified: "I believe this is the one" (p. 307, Q. 18). But the jealous scrutiny of the counsel representing the Government did not end here.

The counsel for the claimant were called upon (p. 305) to do so, and they produced the original of the Exhibit A. so annexed to Castillero's petition to the Land Commissioners, and the witness Weekes verified it as being signed by him. It was all in the handwriting of J. A. Forbes, and Weekes believed it to be a correct copy of the said original Alcalde's *espediente* that he had often seen, and which was *then* in his office. But he testified that, in unreflecting confidence, he signed the certificate prepared by J. A. Forbes without making any comparison.

See the original certified copy in Spanish, pp. 311 *to* 316.

See the translation thereof, pp. 75 *to* 78.

Testimony of Alcalde Weekes, pp. 305 *to* 311.

It may not be easy to justify the simple facility with which these illiterate Alcaldes, Spanish and American, performed official acts in reliance upon the integrity and superior intelligence of the applicant. But *all* the complicated slips or discrepancies in these copies are completely and most satisfactorily explained.

The Explanation.

J. A. Forbes, on his direct examination by the Government's counsel, testified that he wrote the whole of this Weekes' certified copy, including the certificate of Weekes and the endorsement. That, by direction of A. Forbes, he copied the whole of it, except the certificate of Weekes, from a paper delivered to him by A. Forbes; that he had returned such paper either to Alcalde Weekes or to A. Forbes, and had not since seen it; and that he knew nothing about the *Chabolla* certificates (pp. 451 to 454).

This testimony was given in December, 1857. A. Forbes was then in England, and Castillero was in Mexico. Both were, in fact, interested and incompetent as witnesses. And age forbade either to make a journey to California. The court could not, and the Government would not, allow commissions to issue.

Doubtless J. A. Forbes could readily have explained all this; but he was not so inclined. On the contrary, his object was to embarrass Castillero's grantees. Probably he had suggested this very puzzle to Mr. Randolph.

From the time of J. A. Forbes' examination, Dec. 1857, until May or June, 1860, it remained inexplicable whence came the date 30th, whence came the copy of Alcalde Pico's receipt for his fees, whence came the copy of Alcalde Chabolla's certificates of January 13, 1846. All these were found in the copy made by J. A. Forbes, signed by Weekes, and acted on by the claimant's counsel. Whence did they come was the mystery. But, at last, the duplicate Act of Possession, which it had long been supposed Alcalde Pico must have delivered to the applicant, was found. Alcalde Chabolla's original certificates of Jan. 13, 1846, were also found in the same place.

These originals, of course, furnished the means of bringing in the testimony of all the witnesses concerned in their preparation who were yet living.

We proceed to state the evidence on these subjects.

Walkinshaw, the first director of this mine appointed on behalf of the *Aviadores* by A. Forbes, in January, 1847, was, as we have seen, displaced in August, 1849, J. A. Forbes being appointed in his place. We have shown that this removal excited Walkinshaw's anger in a high degree. For a full statement.

See this Brief, pp. 58 to 62.

There is ground to presume that this very peculiar man, Walkinshaw, maintained no kind relations with the *Aviadores* or any of his co-owners at any time thenceforward to the end of his life.

Walkinshaw, in 1847, bought two barras in this mine from the brothers Robles. His title to these was recognized, and the dividends thereon were regularly paid to him. But he also claimed a third *barra* under an alleged conveyance from Padre Real to Macnamara, on June 10, 1846. His right to this third *barra* was disputed, and on February 2, 1853, he brought an action against Bolton, Barron & Co., of San Francisco, the agents for the *Aviadores* for dividends upon it. In this action *Hall McAllister, Esq.*, was his attorney.

Testimony of Young, p. 2685, Q. 5, 6, and p. 2687, Q. 21.

Transfer from Padre Real to Macnamara, pp. 2692, 2695.

Testimony of Hall McAllister, p. 2699.

In June 26, 1854, after an ineffectual struggle by Walkinshaw's counsel to put off the trial in order to obtain necessary evidence, this suit was dismissed (p. 2700).

Walkinshaw had delivered his papers in relation to this claim to Mr. McAllister, and they remained in his hands until May 15, 1858 (p. 2700).

Walkinshaw was a peculiar man, and " extremely fussy

about his papers" (p. 2706, 2686, Q. 16). See his controversy with J. A. Forbes, and attempts to denounce the mine for desertion, in the name of his attorney, Mr. Hawes, as stated in this *Brief*, at pp. 58 to 62.

In May, 1858, he called for his papers, paid Mr. McAllister's bill, and received them. He was petulant, and exacting in this little affair.

Testimony of Mr. McAllister, pp. 2698 to 2711.

Testimony of William S. Reese, pp. 2712 to 2717.

This transaction occurred May 19, 1858 (p. 2692). Walkinshaw was then and for a year had been *very* ill, he had, indeed, been ill for two years (p. 2587, Q. 17, 18). On the next day, May 20, 1858, he departed for Scotland, and, in Aug. 1858, died there (p. 2684, Q. 4). It will be noted that he was thus sinking and in the worst stage of his last illness before Mr. Randolph began to insinuate or any one had insinuated fraud and ante-dating.

He left his papers with his son-in-law and executor, *John Young* (p. 2685, Q. 7).

Mr. Young labelled them thus: "papers relating to the disputed barra between R. Walkinshaw and Messrs. Bolton, Barron & Co., May 24, 1858. J. Y." A few weeks prior to July 17, 1860, which was the date of Mr. Young's examination, Mr. Thomas Bell, a member of the firm of Bolton, Barron & Co., was, by desire of Mr. Billings, searching for papers "relating to the Padre Real's interest in the mine." He examined Walkinshaw's papers in the hands of Young, and there found, in this labelled parcel, a set of papers endorsed in Walkinshaw's handwriting, "titles of mine" (p. 2685, Q. 12, p. 2687, Q. 19. *See Bell's direct examination, cross-examination being waived*, p. 2696, 2697).

This set of papers proved to be *the commencement* of what the Spaniards would call an *espediente* or *testimonio* of Castillero's title to the mine. *See it* p. 2688, *translation*, p. 2693.

It contained as follows:

1. A heading thus:

"Espediente of the denouncement, possession and partnership of the Quicksilver mine, called Santa Clara, Jurisdiction of San José Guadalupe, in Upper California.

"November 22d, 2845.—Don Andres Castillero makes the denouncement of the aforesaid, in the Pueblo of San José Guadalupe, for want of deputation of mining and of Judge *de letras.*

"December 3d, 1845.—Writing which the said Castillero presented, testifying to having taken out quicksilver and other metals, asking that it be annexed to the espediente.

"December 30th, 1845.—Act of possession which, with the assisting witnesses, the Alcalde of the Pueblo of San José gave to Don Andres Castillero of the mine of Santa Clara, because of the time of the notices being completed.

"December 30th, 1845.—Receipt for the fees of the possession signed by the Judge of San José.

"December 8th, 1845.—Writing of partnership for the works of the mine, authorized by the Prefect of the 2d District."

2. A copy of Castillero's first representation to Alcalde Pico, dated November 22, 1485, with a certificate at the end thereof that it was a copy of the original, dated January 13, 1846, signed by Alcalde Pedro Chabolla and Pedro Sainsevain and José Suñol his assisting witnesses.

3. A copy of Castillero's second representation, dated December 3, 1845, with a like certificate by Alcalde Chabolla and the same assisting witnesses.

4. A duplicate original of Alcalde Pico's Act of Possession with the date filled up thus, "December 30, 1845." To this was appended an original receipt by Alcalde Pico for $25, his fees.

These were all the papers found in this *espediente*, and it should be noted that the actual contents fell short of the table of contents at the head. There was no writing of partnership. That paper must have been at some period annexed, or at least intended to be annexed to this *espediente.*

On Nov. 7, 1857, long prior to the time when these papers were found in the hands of Walkinshaw's executor, the claimant produced and proved a copy of the article of partnership, duly certified by Prefect Manuel Castro, conformably to its own 7th clause, with Alcalde Pico's authentication as a witness superadded.

Testimony of José Fernandez, p. 601, *Q.* 15.
Exhibit C. D. p. 624.
Testimony of Alcalde Pico, p. 629, *Q.* 3, 4.

This last-mentioned paper completes the series called for by the heading of the *espediente* found among Walkinshaw's papers.

Before showing their utility and influence in the cause, we state the proof of their genuineness.

It was shown that the heading and table of contents, as well as an interlineation in the copy of Castillero's first representation were in the handwriting of Castillero himself (pp. 3069, 3043). It will be remembered that Castillero had left California in April, 1846, for Mexico, and had not returned.

Pedro Chabolla testified that the two certificates of January 13, 1846, were signed by him, and that he was Alcalde at the time (p. 2806 to 2808).

Pedro Sainsevain, one of the assisting witnesses, also testified to its genuineness (p. 2809 to 2818).

The handwriting, and subsequent death of *José Suñol*, the other assisting witness to Alcalde Chabolla's certificate, were testified to by his father and his brother-in-law (p. 2719, 2810).

Alcalde Pico and his assisting witnesses, Antonio Suñol and José Noriega being now recalled, they testified that this Act of Possession was a duplicate executed at the same time with the other and drawn up in the handwriting of the same scrivener, Gutierrez (p. 2727, Q. 64, 65).

Testimony of Alcalde Pico, p. 2731, *Q.* 2; p. 2743, *Q.* 55 *to* 66, 74 *to* 80.

*Testimony of Antonio Suñol, p.*2718, *Q.* 2; *p.* 2724, *Q.* 46 *to* 59.

Testimony of José Noriega, p. 2803 *to* 2805.

The receipt was proven to be the handwriting of the same scrivener, Gutierrez, and to have been signed by the Alcalde (*Pico*, p. 2732).

And now we have the means of ascertaining from what materials J. A. Forbes made up the Alcalde Weekes' *espediente* of January 20th, 1848 (p. 78).

At that date A. Forbes was on a visit to the mine (pp. 454, 955 to 957).

At that date Walkinshaw was Director of the Mine, and at the mine, and probably had custody of all the papers belonging to it.

At that date J. A. Forbes was living in Santa Clara, a shareholder in the mine, and, as amply appears, was quite officious in making himself serviceable to A. Forbes, the chief of the *Aviadores*, and a large shareholder in the mine.

J. A. Forbes, at this time, made up in a neat form his notion of an *espediente* of the title to the mine, got it certified by Alcalde Weekes, and, as it was found in the hands of the claimant's counsel, we may presume that he, J. A. Forbes, handed it to Mr. A. Forbes. He made it up from the very materials here now stated. The fact can readily be ascertained by a comparison.

See the Weekes Espediente, p. 312. *Translation,* p. 797 to 801.

It consists of:

First. A heading in the identical words of the *general* heading which Castillero had prefixed to *his* espediente of Jan. 13, 1846.

Secondly. Copies of the two representations of Castillero, each followed by Alcalde Chabolla's certificate of their being copies.

Thirdly. Alcalde Pico's duplicate Act of Possession, with the date "30th" inserted; and with the addition of a receipt for fees—very properly not attached to the duplicate kept for record.

See original of the paper found with Walkinshaw's Exr., p. 2688. *Translation*, p. 2693.

See original of the certified article of partnership produced by claimant, p. 624.

This comparison solves all the puzzles presented in connection with this subject.

Castillero's *espediente* made up by himself, or under his direction, about January 13, 1846, doubtless passed into the hands of A. Forbes, the head of the Aviadores, and a large owner of the mine. We think this happened at or about the time of the transactions related by Negretē, in December, 1846. *See this Brief*, pp. 46, 47, 90 to 95.

It formed the materials of Mr. J. A. Forbes' neat and orderly *espediente*, made up by him for certification by Alcalde Weekes, January 20, 1848. And it is most probable that even J. A. Forbes, however inaccurate, was honest in that transaction. Doubtless he thought that the originals of all those papers were then in the *Jusgado*. He did not advert to the incongruity of repeating prior certificates such as Chabolla's, of which, of course, no copy is ever preserved.

When unceremoniously dismissed in 1849, Walkinshaw would naturally enough have kept what papers happened to be within his reach. By this means part of Castillero's *espediente* of January, 1846, remained with him, and the other part, *i. e.* the certified copy of the partnership articles, went with the rest of the papers to his successor, J. A. Forbes, in 1849, and from the latter to his successor, Della Torre, in 1850 (p. 460).

When this claim was presented in September, 1852, and copies were needed to annex to the petition, the

Weekes' copy was used for that purpose. This was probably done by the attorney's clerk.

It will be borne in mind that at this date, *i. e.*, September 30, 1852 (p. 28), no person had ever yet hinted a doubt as to the verity or genuineness of Castillero's title-papers. Consequently, no one paid close attention to details like these.

When the claimant's counsel, as early as December, 1857, sought from J. A. Forbes, the maker of this Weekes' *espediente*, an account of the origin of that paper, that individual stated that he made it from papers handed to him by A. Forbes. But, said he, "I believe he procured them from the Alcalde." He further testified thus: *Q.* "What did you do with the originals after you had made the copy?—*A.* I can't say whether I handed them to Mr. Forbes or the Alcalde" (p. 451). This insinuation, that he might have copied from the act on file in the Alcalde's office, was untrue.

A comparison of the papers shows conclusively that the Weekes' *espediente* of January 20, 1848, could not have been made from the Alcade's *espediente* remaining on file in the *Juzgado*. It contains many things which are not in that *espediente*.

On the other hand, these very things so found in the Weekes' *espediente*, are all found in the other set of documents, and they are characteristic of that set.

J. A. Forbes' insinuation at pp. 452 to 454, was probably a wilful perversion on his part. At the time he made the Weekes' *espediente*, he may have assumed, somewhat thoughtlessly, that the originals were in the *Juzgado*. But, when aiding Laurencel to throw doubts upon this title, a moment's critical attention to the Weekes' paper would naturally suggest, and it probably did suggest to his mind, that it was not an exact copy of those, and included other

papers. Hence his ambiguous givings out at pp. 452 to 454. Thus ends this long explanation of the Government counsel's suspicion No. 6.

But:

We think fit now to recur to the surmise of the District Judge, that Castillero neither exhibited nor mentioned the Alcalde's Act of Possession during his interviews with Mr. Negreté at the city of Mexico in Dec., 1846. *See this Brief, ante, pp.* 53 to 56.

Immaterial as that surmise would be, if it were correct, our scrutiny has convinced us that Castillero did actually produce the Alcalde's Act of Possession at the very commencement of these interviews.

We have seen that, on January 13, 1846, Castillero made up his *espediente* containing the Alcalde's Act. By the circumstance of its having a precise day of date, *i. e.*, "30th," this duplicate is, at all points of time, distinguishable from the other which remained on file in the *Juzgado.* All the copies taken from each are stamped with unmistakable indicia of their parentage.

We have seen that, on January 20, 1848, Castillero's duplicate Act together with the other papers constituting his *espediente,* so made in January, 1848, was in the hands of A. Forbes in California. Walkinshaw, the director of the mine, was liable to be called upon to defend against litigation at any moment. It would have been proper to leave with him the original *testimonio* of title. A. Forbes probably adopted that course, and accordingly, it is shown to have been in his (Walkinshaw's) hands in January, 1853. Thenceforth he or his counsel held it until he left the country in 1858.

Thereafter, in 1860, it, or the principal part of it, was found in the hands of John Young, his executor.

From these plainly established facts, it would seem very clear that, at some period between Jan. 13, 1846, and Jan. 20, 1848, Castillero's *espediente,* as made up at

the former date, passed out of his hands and into the hands of A. Forbes. When, where and how that transfer of custody took place, is the point of our present inquiry.

A. Forbes resided and did business at Tepic. It does not appear that he ever visited the city of Mexico. Castillero went from California to the city of Mexico in April, 1846, and never returned, (p. 424, p. 2612, Q. 4). It does not appear, presumptively or otherwise, that at any time between that date and Jan. 20, 1848, he (Castillero) was at Tepic. There is no reason to suppose that A. Forbes and Castillero ever had a personal interview prior to January 20, 1848. On the contrary, A. Forbes learned everything about the mine from J. A. Forbes' communications to him (pp. 539, 540, 382); and when he concluded to purchase shares in it, he wrote to his friend *Negrete*, at the capital, to conduct the negotiation in his behalf. *Negrete* went about among the Castillero's and after some search found Capt. Don Andres (p. 2395, Q. 9 to 12).

The whole testimony of *Negrete* and his letters show that, in his intercourse with Castillero, the latter was prompt, frank, and liberal (pp. 2492, 2495, 2497). Doubtless Castillero was delighted to find that a wealthy mercantile house was about to develope his mine. *Negrete's* very short letter to A. Forbes, dated Dec. 5, 1846 (p. 2485), announces his first interview with Castillero and says: "he has promised to think over the business and bring me his propositions to-day, and also the document of the ownership of the mine which he has in his possession." This language does not, according to the probable phraseology of Castillero, describe the two-league grant. And, indeed, it appears from Negrete's subsequent letter of December 18, 1846 (p. 2492), that the grant was looked upon as a distinct thing and was brought to *Negrete's* notice by Castillero at a period subsequent to Dec. 5 as a superadded bene-

fit which he, Castillero, was willing to cede to the *aviadores*. The memory of a witness, speaking of his transactions as agent for another in a business of which he was wholly ignorant, is not always reliable as to these minute details; but his contemporaneous correspondence with his friend and principal may form very unexceptionable guides to the truth.

The precise words of this letter of Dec. 18, 1846, are: "the grant which the government made in favor of Don Andres Castillero for two square leagues of land at the place where the mine was situated, and which he cedes for your benefit for the term of sixteen years." (p. 2492).

In Castillero's deed for the sale of five *barras* in *the mine* itself, to A. Forbes, so carefully drawn up, at this very date, with all "the skill, wisdom and experience" of *Negrete's* lawyer *Romero,* (pp. 2488, 2490), does not contain a word of reference to the two-league grant. It speaks of and conveys only the mine and nothing but the mine, or rather five *barras* or shares in it. And Castillero's title to this mine is stated to have been "acquired as discoverer." (p. 1203).

But, in Castillero's ratification of the *Avio,* bearing the same date, negotiated by the same parties, superintended by the same skillful counsellor Romero, the Castillo Lanzas' despatch of May 23, 1846, containing the two-league grant, is set forth at length. And Castillero in the deed (p. 1200) declares that: "He cedes in favor of the contractors of supply, (*avio*), and for the 16 years of this contract, the two square leagues of land of which the Supreme Government has made him a concession, as is shown by the official document which he presents, that it may be copied at the end of the present instrument."

Thus Negreté's letter of Dec. 18, 1846, showing that the two-league grant had nothing to do with the

title to the mine, but was a different thing, is thus confirmed by these contemporaneous deeds.

We return to Negreté's first letter, *i. e.* that of Dec. 5, 1846. (p. 2485). He wrote it at "eight o'clock at night," in fear of losing a mail should he longer await Castillero's promised visit with "the document of the ownership of the mine, &c."

Then comes a postscript, written when the mail was "about to close, and without time to say more." This hurried postscript announces that after *Negrete* had signed his letter, "Senor Castillero has come to bring me the contract of partnership in the mine with a copy of the original, *which I transmit.*"

Whether by the words employed Negreté meant that he transmitted the original or the copy, may be doubtful. Perhaps the strict construction is that he sent the copy and retained the original. But this is certain, he received two papers and in a great hurry sent one of them by mail to Mr. A. Forbes that same night, supposing at the moment that they were alike, one being a copy and the other the original.

It was supposed by the District Judge that Mr. Negreté never saw and that Castillero never produced the Alcalde's Act of Possession. For this conclusion there was no other basis than Negreté's recollection of the affair in 1859. Negreté says at p. 2432, Q. 179: "I don't remember having seen any thing but the contract of partnership between Castillero, Castro, and others. *I don't mean the original*, but a copy of it, certified by Antonio Maria Pico."

Negreté distinctly negatives the fact that he ever saw the *original* article of partnership. It would be strange, indeed, if he had seen it. Castillero had it not, and could not have produced it. By its own 7th clause, it was to remain with the Prefect, Manuel Castro, in California.

Castro certainly had it in his possession in December, 1845, for he issued certified copies of it. There is not the slightest evidence in the record that it ever passed out of his possession. And it would be contrary to well-settled rules of evidence to conjecture that it did (*Mactier v. Frith*, 6 *Wend.* 115).

We have, then, clearly before us that Castillero promised to bring "the document of the ownership of the mine" to Negreté on December 5th; that, in fact, he had the duplicate original of that document, and also a copy of the article of partnership; that he came and handed to Negreté two papers; that Negreté, by some means, was led to conceive that one was an original, and the other a copy of the same document, and that on the instant and in great haste, as the mail was about to close, he perused one of these papers, and sent the other by mail to A. Forbes.

He had not time to read both papers. He swears that he saw and read a copy of the article of partnership, but that he does not remember ever having seen any original of *either* the partnership article or of the Act of Possession.

What, then, was this paper which Negreté thus hastily and in something of a flurry sent to A. Forbes?

Negreté testifies that he never saw *any* original. His letter shows that Castillero had just brought him a paper then supposed to be an original. Of course the paper sent to A. Forbes must have been that supposed original. Then, was it the duplicate original Act of Possession which Castillero really had at the time, and which he had promised to bring to Mr. Negreté, or was it the original article of partnership which he had not in his possession, could not have brought, and had not promised to bring?

There can be but one answer to this question. And by way of confirmation strong, the next knowledge we have of Castillero's duplicate of the original Act of Pos-

session is that Mr. Alexander Forbes is in possession of it at the mine on the 20th of January, 1848.

Suspicion No. 7.

J. A. Forbes, when introduced as a witness for the Government, was severely pressed on cross-examination, as to his ever having had any reason to doubt the *verity* of the Castillero title to the mine. He answered quite evasively. But (on p. 442) he says: "I don't know that I ought to answer. I will state, however, that from the time Mr. Alexander Forbes was in California, I was apprehensive that there was something wrong about the title to the mine, in consequence of the second possession given by the Alcalde of San José in 1848."

This very insincere answer is readily disposed of:

The nature of *pertenencias*, the technical necessity of measuring them off, the true number to which a discoverer was entitled, the additional number which might be claimed in case he formed a company to work the mine, and the right to change the location of their boundaries ("*a la mejora de Estacas*") on discovering that the dip or course of the mineral vein had been mistaken, in case so doing did not interfere with the existing location of another neighboring mine, were all questions admitting of a variety of opinions. It appears plainly enough, from the evidence, that Padre Real, and Castillero himself, and this J. A. Forbes, read, studied, and pondered upon the somewhat complex provisions of the mining ordinances touching these subjects (pp. 446, 453, 456, 473).

Hence, in 1848, whilst A. Forbes was in California, J. A. Forbes drew up a petition to the then Alca lde, Weekes, praying a judicial re-examination of the mine according to the ordinances, an ascertainment of the proper increase of *pertenencias*, the reforming and correcting of boundaries, &c. A survey was had accordingly, and a re-

formed assignment of boundaries, &c., made. J. A. Forbes wrote both the Petition and Concession (pp. 167, Q. 21 to 23).

See Petition to Alcalde Weekes, dated January 19, 1848, p. 387 and p. 168.
See Translation thereof, pp. 387, 806.
See Concession by Alcalde Weekes accordingly, pp. 147, 148.
See Translation thereof, p. 805.
Testimony of Alcalde Weekes, p. 166, Q. 13 to 30.
Testimony of J. A. Forbes, pp. 444, 453, 464, 465; p. 919, Q. 371.

The government introduced these papers, calling Alcalde Weekes to prove them. It is difficult to imagine why, unless it were to show that there was a distrust in some minds as to the strict legality or technical regularity of the possession given by Alcalde Pico; for they are both founded upon and expressly refer to the prior registry or denouncement, and juridical possession. If their framers had any distrust, it was not as to the *bona fides* of the acts performed in 1845, or as to the verity of the papers, but as to the technical sufficiency of these things.

J. A. Forbes himself thus testifies in 1857 (p. 474):

Que. When you made this answer (i. e. Feb. 11, 1856), had you any reason to believe that what is stated on the 29th section (p. 571) as to Antonio M. Pico, Alcalde, on 30th Dec. 1845 having put Andres Castillero in possession of said mine, and having granted him said tract of land, was not true ?

Ans. No, sir ; so far as regards the possession, some sort of a possession, possibly of 3,000 *varas*, I had no reason to believe it untrue.

Suspicion No. 8.

Amongst the letters in Davidson's box was one from A. Forbes to J. A. Forbes, whilst both parties

were in California, there was one dated "N. Almaden, January 19, 1848," (p. 386). It was in these words: "I am very much obliged to you for your very prompt attention to the business in hand, and return the espediente immediately. I am much surprised at the result of your assay, and shall try what I have. It will of course be better to say nothing about it, particularly as I have already written to Monterey that there is no mine, nor does there appear to be any quantity of this kind of stuff. I hope soon to see the Alcade."

J. A. Forbes, in his testimony, sought to connect this letter, which as we shall presently see had no reference to the mine of New Almaden, with another letter of Nov. 24, 1847, on p. 386, which *did* relate to that mine. And he sought thence to excite a suspicion that A. Forbes was, at this time, giving out or pretending to some persons, that the mine of New Almaden was "no mine." It is not easy to comprehend for what purpose this fling was fabricated.

See Testimony of J. A. Forbes, pp. 448, 449, 456.

On a careful perusal of this letter, dated January 19, 1848, it may be seen that the writer does not seem to be speaking of the mine at which he dated the letter. Besides, J. A. Forbes committed an oversight. He left upon this letter an endorsement of his own, in pencil, showing to what business it did relate. It was in these words:

Suñol 4½, *Sainse* 4½, *Pena* 4½, *Narbaez* 4½, *Padre* 4, *Forbes* 2" (*p.* 387).

These numbers together make just 24. Mr. Peachy, the counsel for the claimant, knew that this was the precise number of shares, or *barras*, into which by Mexican usage a mine is always divided; and he knew, as can readily be perceived from the evidence, that

this schedule of ownership did not apply to the mine of New Almaden. So he thus cross-interrogated Mr. J. A. Forbes at p. 489.

"*Q.*—Look at pencil memorandum of 'F. No. 6—O. H., No. 20." In whose handwriting is it? To what does it refer?

"*A.*—It is my handwriting, and refers to the shares to be divided out of the mine of San Antonio, which I was commencing to work." Seeing that he was caught, he adds: "I must casually have made the memorandum on this piece of paper."

The Court will see that it was not a "piece of paper;" but a letter from his respected correspondent, Mr. Alexander Forbes, which he had carefully endorsed and filed for preservation (p. 387).

But to cap the climax and show this to be the idlest of idle pretences, it was on this very 19th of January, 1848, that Mr. J. A. Forbes drew up, and Mr. A. Forbes signed an elaborate written representation of the thorough and effective working of the mine of New Almaden to be filed of record with Alcalde Weekes, in order to obtain the before-mentioned decree or concession of that officer to increase and improve the *pertenencias* thereof.

> *See original petition of January* 19, 1848, *pp.* 168, 387. *Translations thereof, pp.* 387, 806. *Concession by Weekes' accordingly, pp.* 147, 148. *Translation thereof, p.* 805.

We believe every suspicion intimated in support of the allegation that the Alcalde's Act of Possession was fabricated subsequently to its date and purport, has been examined, and that all the material evidence in respect to each and every of them has been fully stated.

THIRD HEAD.—*The Attempted Impeachment of the Mexican Documents.*

In this chapter, a closer inspection of Mr. James Alexander Forbes becomes necessary. He was endowed by nature with great mental acuteness, and is a person of fair acquirements. (p. 915, Q. 361. p. 917, Q. 368. p. 919, Q. 371, pp. 937 to 944).

He has resided in what is now Santa Clara county, Cal., since 1832, (p. 889). Almost from its very discovery, he was closely connected with this mine. His favorable reports were the main if not the sole means of bringing to its developement the wealth, influence, and enterprise of his correspondent, Alexander Forbes, of Tepic. Nevertheless he was finally removed from his Directorship, in May, 1850 (pp. 435, 460). And it is presumable that his fortunes did not subsequently improve.

In May 29, 1855, he sold out his last remaining interest in the mine (p. 472). By November, 1856, he had become deeply insolvent and was declared a bankrupt (p. 475).

At the time of his bankruptcy, he owed $3,200 to Bolton, Barron & Co., of San Francisco, the agents of the *Aviadores* (p. 475). After the bankruptcy, he applied to that firm for a loan of $10,000 (p. 475), and was much wounded by their refusal (p. 871 *last paragraph*, 872 *first paragraph*, p. 942, ans. 440, p. 943, Q. 442).

The counsel for the Government took some pains to prove that he was arrogant and conceited. That fact seems to be reasonably established, (p. 982, Q. 17. p. 993, Q. 11. p. 995, Q. 10).

The claimant produced ten witnesses who testified in strong terms to the bad character of J. A. Forbes (pp. 960 to 993). He was indicted for perjury (p. 3168), but escaped on a technical ground, (p. 973). No testimony was offered in favor of his character. Common ex-

perience forbids the belief that none could have been given; but professional policy might see an advantage in leaving its instrument to perish undefended.

Between November, 1856, and March, 1857 (p. 378), and after Bolton, Barron & Co.'s refusal to lend him money (p. 872), J. A. Forbes opened negotiations with H. Laurencel (p. 475). The contract or contracts in which these negotiations eventuated were in writing, but had been destroyed by the parties for prudential reasons (p. 380). All the evidence concerning the contract or contracts came from Laurencel and J. A. Forbes.

See Laurencel's, pp. 377 to 380.

See J. A. Forbes', pp. 465 to 472, 489, 871, 872, 894 to 897, 917, 918, 942, 943. 881, Q. 77, 895, Q. 197.

J. A. Forbes made no statement to Laurencel that the title papers of the claimant, or any part of them, were false or fraudulent, but merely produced to him certain correspondence between himself, J. A. Forbes, and Barron, Forbes & Co., or members of that firm, leaving Laurencel to form his own judgment as to their tendency (p. 466).

A contract was made that Laurencel should pay J. A. Forbes $20,000 for the use of these letters, in an effort to procure a compromise from Castillero's grantees (p. 917, Q. 368. p. 895, Q. 197. p. 881, Q. 77). The papers were to be used for that purpose exclusively, J. A. Forbes not intending that they should be made public or that he should be required to testify concerning them. $10,000 was paid down, the remaining $10,000 were to be adjusted after the compromise.

J. A. Forbes and Laurencel thereupon, and in, say March, 1857, placed these letters in a box and deposited them with Mr. Benjamin Davidson, "subject to their joint order, to be used [only] by the joint consent of both" (p. 375, Q. 2—p. 378, Q. 25).

Thus armed, Mr. Laurencel, at a date not precisely stated, approached Castillero's grantees for a compromise. In their behalf, Mr. John Parrott answered that if J. A. Forbes or Laurencel had such documents, as were spoken of, "they were fraudulent." "Mr. Parrott inspected the documents," and persisted in disregarding them (p. 380, 381).

So the attempt to bring about a compromise between the Fossat and Castillero claimants failed from the contemptuous refusal of the latter.

It will be remembered that the various criticisms upon the Alcalde's Act of Possession, and suspicion-intimating inquiries concerning its original and its various copies, begun contemporaneously with the appearance of Mr. Randolph, the counsel of the Fossat claimants, as acting counsel for the Government. This was in June, 1857, or August, 1857 (pp. 165, 252).

The hope of the Fossat claimants to wring a compromise from the apprehensions of Castillero's grantees, caused the efforts which commenced immediately after the deposit of the letters with Davidson, in March, 1857. That hope perished before Nov. 28, 1857. And that date brings us to the next step in the drama now being exhibited.

On Nov. 28, 1857, Mr. Davidson, on a *subpœna duces tecum*, issued by the District Attorney, brought the box of letters into court. Laurencel testified to the receipt of them from J. A. Forbes. G. W. P. Bissell identified the handwriting.

See Davidson's testimony, pp. 375, 376.
" *Laurencel's* " *pp.* 376 *to* 380.
" *Bissell's* " *pp.* 380 *to* 381.

Thus, on Nov. 28, 1857, the letters which J. A. Forbes had sold to Laurencel were in court; but they were not yet adequately proven. The court overruled

an attempt to prove J. A. Forbes' statement concerning them (p. 377, Q. 20—p. 471).

No one but J. A. Forbes himself could effectively verify them. The production of them, as evidence, was a violation of the contract under which he had parted with them (p. 470). He had expressly bargained that he was not "to testify in this case" (p. 470). But he was at length produced, and his examination commenced on Dec. 14, 1857, more than a fortnight subsequently to the defeated attempt to prove the letters without him (pp. 433 to 490). During this interval, Laurencel informed him his testimony would be necessary "to prove the identity of those papers," and was obliged to give him, in cash and promissory notes, the remaining $10,000 (pp. 468, 471).

The correspondence thus obtained from J. A. Forbes, and now before the court, consisted of original letters to J. A. Forbes, and, *as he alleged*, his own copies of letters written *by* himself.

On his cross-examination, he drew a distinction between "*private*" letters, and "letters of a public nature connected with the mine." He testified that "*all*" letters of the latter class were "handed over * * to Mr. Della Torre," his successor in the directorship of the mine, "at the time I (J. A. Forbes) transferred the possession" (p. 460).

He thus testified at p. 459:

Q.—Do the letters concerning which you have testified, and which you have offered in evidence, contain all the correspondence between you and Mr. Alexander Forbes, or with Barron, Forbes & Co. with reference to the mine?

A.—I believe they contain all the private correspondence I had with those gentlemen.

Q.—What do you mean by private correspondence?

A.—I mean letters alluding to matters I considered private.

Q.—Are these all the letters you showed Mr. Laurencel?

A.—They are.

The counsel for the claimant then produced to him and verified by him, six letters to A. Forbes, written by him. There are respectively exhibited as O. H. X. No. 1 to 6, pp. 459, 460, and pp. 539 to 545.

Some of these additional letters were marked "Private." J. A. Forbes then divided the "private" letters into two classes, saying "in explanation of his previous answer," that the correspondence [*i. e.*, that delivered to Davidson] which he had represented to contain all his private correspondence with Alexander Forbes or Barron, Forbes & Co., "contains all his private correspondence when he was in charge of the mine, or at and about that period. He makes this explanation in justice to himself, as some of the letters just shown him are marked private" (p. 460).

On June 29, 1858, the claimant obtained leave to recall J. A. Forbes for further cross-examination (pp. 834 to 836). The claimant then produced three letters from him, J. A. Forbes, to Barron, Forbes & Co., or members of that firm, which he identified as portions of the correspondence.

Further testimony of J. A. Forbes, pp. 837 *to* 841.

The three additional letters of J. A. Forbes, pp. 842 *to* 848.

The letters of this correspondence produced from the Davidson box (pp. 382 to 408); the six added on J. A. Forbes' cross-examination at that time (pp. 539 to 545); the three additional letters verified by J. A. Forbes on his recall for further cross-examination by the claimant in June, 1858 (pp. 842 to 848), and two others (p. 3050), arranged in chronological sequence, are as follows:

Chronological List of Letters.

1846	Jan.	30	J. A. Forbes to Eustace Barron,	p. 539
	May	11	Alex. Forbes to J. A. Forbes,	382
	Sept.	2	Do. do.	382
	"	22	J. A. Forbes to Alex. Forbes,	541
1847	Jan.	7	Alex. Forbes to J. A. Forbes,	383
	May	5	J. A. Forbes to William Forbes,	842
	July	14	Do. to Alex. Forbes,	541
	Oct.	1	Alex. Forbes to J. A. Forbes,	384
	Nov.	19	Do. to do.	385
	"	24	Do. to do.	386
1848	Jan.	19	Alex. Forbes to J. A. Forbes,	386
	Feb.	1	Do. to do.	388
	"	7	J. A. Forbes to Alex. Forbes,	542
	"	17	Do. to do.	547
	Mar.	20	Alex. Forbes to J. A. Forbes,	954
	"	22	J. A. Forbes to Alex. Forbes,	956
	"	25	Alex. Forbes to J. A. Forbes,	955
	"	28	Do. to do.	864
	"	28	Do. to do.	865
	June	28	J. A. Forbes to Alex. Forbes,	957
1849	Jan.	13	J. A. Forbes to Alex. Forbes,	3050
	April	11	Barron, Forbes & Co. to J. A. Forbes,	390
	May	20	Do. to do.	390
	Oct.	27	J. A. Forbes to Barron, Forbes & Co.	3054
	"	28	Do. to William Forbes,	392
	"	28	Do. to do	844
	"	30	Do. to Alex. Forbes,	393
	"	31	Do. to Barron, Forbes & Co.	3056
	Nov.	18	Do. to do.	952
	"	30	Barron, Forbes & Co. to J. A. Forbes,	394
	"	30	Alex. Forbes to J. A. Forbes,	395
	Dec.	1	Do. to do.	396
	"	20	J. A. Forbes to Barron, Forbes & Co.	846
1850	Jan.	7	Alex. Forbes to J. A. Forbes,	397
	"	29	J. A. Forbes to Alex. Forbes,	399
	Feb.	3	Alex. Forbes to J. A. Forbes,	400
	"	6	Barron, Forbes & Co. to J. A. Forbes,	543
	"	26	J. A. Forbes to Alex. Forbes,	403

1850	Mar.	2	Barron, Forbes & Co. to J. A. Forbes,	404
	"	11	Alex. Forbes to J. A. Forbes, .	404
	April	7	Do. to do. . . .	405
	June	6	Do. to do. . . .	406
	"	18	J. A. Forbes to Ysidoro de la Torre,	544
1851	Jan.	10	Alex. Forbes to J. A. Forbes, .	407

Purport of the Correspondence.

A paper purporting to be a copy of a letter to J. A. Forbes dated March 28, 1848 (p. 864), was produced, under very extraordinary circumstances, eight months subsequently to his first examination, that is to say on July 15, 1858 (*p.* 856). The claimant insists this was itself a forgery: it is consequently left out of view for the present; and must be excepted from the summing up of the correspondence now presented.

These letters prove several things conclusively, and, possibly, they present one debatable question. That question is of no material relevancy in point of law.

First. They show that the same identical documentary evidence produced before the Land Commissioners, and then and still relied upon for proof of title in the claimant, was either known or believed to exist from the earliest period at which any part of it was referred to in the correspondence; and that no thought or suspicion that any part of it was fraudulent, forged, or antedated had ever entered the mind of any one.

Secondly. They show that J. A. Forbes, though not a lawyer, was a close student of the mining ordinances and colonization laws, and that upon comparing Castillero's documents with his (J. A. Forbes') notions of Mexican law, he, J. A. Forbes, conceived that, in strictness of legal construction, these documents were technically defective precisely in the respects which

have since been urged against them by the Government. The *Points* in these respects in the Government's brief are in almost literal conformity with J. A. Forbes' letters.

Thirdly. They show that, after the American possession of California, J. A. Forbes pertinaciously and for a considerable period urged his principals to obtain from the Mexican authorities new documents of the same dates and to the same substantial purport as those already existing; but so worded as to be free from the said supposed technical defects or blemishes. He pointed these out and explained them with the greatest particularity and precision.

Fourthly. They show expressly that, to the great vexation of J. A. Forbes, the thing so advised by him was not done, and their statement to this effect is confirmed, if confirmation could be needed in such a case, by the controlling fact that the documents produced and relied upon by the claimant exhibit upon their faces all the real or imaginary blemishes of which J. A. Forbes made mention, and on account of which he desired them to be suppressed, and antedated forgeries substituted. The letters thus identifying the title papers now relied upon, verify the genuineness of those title papers, not only as to contents, but as to dates, and completely repel the suggestion of any actual forgery or antedating.

But, Fifthly. They do not show that these fraudulent suggestions of J. A. Forbes were met by any rebuke; and consequently they afford some foundation for an inference that the suggestions were entertained by the persons addressed, and treated as worthy of consideration. This latter inference must contend with the consideration that prudence and the desire "to conciliate a troublesome person," may have dictated the style of reply (p. 398).

If this inference should, nevertheless, be admitted into the judicial mind, a still further prejudicial effect might fol-

low. It might be supposed that the fraud was *attempted.*

Still, no one could possibly conclude from these letters, either alone or coupled with any other proof in the record, that to any extent, or in any degree, a fraud, an antedating, or a forgery, was actually *perpetrated.*

To verify this summing up, we will here present a transcript from the letters of every word bearing upon the question under consideration.

The oral examination of J. A. Forbes did not tend in any degree whatever to vary any one of the five conclusions above stated as being the inevitable result of the written correspondence. This will be distinctly shown in a subsequent part of this statement. *See this Brief, p.* 131 to 136.

ABSTRACT

Of all parts of these letters which appear to have any relation to the charge of fraud and antedating.

James Alexander Forbes to William Forbes. Dated Santa Clara, 5th May, 1847 (*p.* 843).

* * * "It is of the most vital importance to obtain from the Supreme Government of Mexico a positive, formal and unconditional grant of the two sitios of land conceded to D. Andres Castillero, according to the decree appended to the contract, and also an unqualified ratification of the juridical possession which was given of the mine by the local authority of this jurisdiction, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverers. The documents should be made out in the name of D. Andres Castillero and Socios. I think that it will not be difficult to obtain these documents on making known to the Supreme Government that this Departmental Government is completely 'acefalo,' in consequence of which the possession of the sitios ordered to be given by the despatch of Señor Castillo Lanzas has not been obtained, nor cannot be obtained, nor even mentioned without imminent risk of opposi-

tion on the part of the American Government in this department. It is indispensable that the title and ratification of possession should be of the date of the decree of Señor Lanzas." * * *

James Alex. Forbes to Alexander Forbes. Dated Santa Clara, 13th January, 1849 (*pp.* 3051, 3052).

* * * "I beg to impress upon your mind the importance of *suggestions* made by me *to you in my letter to you by Mr. Walkinshaw, May,* 1847, *relative to such matters.* * * * I have much to say to you upon other points, but I cannot write too much upon the subject to which I have alluded, contained in my letter above mentioned, and which I fear has escaped your memory." * * *

NOTE.—This letter is merely proven to be J. A. Forbes' handwriting. Perhaps the Government may at its election reject it as evidence.

Memorandum left by James Alex. Forbes with Alex. Forbes for Castillero in Tepic. May 27, 1849 (*pp.* 391, 392).

"Very private.

"Memorandum of the documents which Don Andres Castillero will have to procure in Mexico.

"1st. The full approbation and ratification by the Supreme Government of all the acts of the Alcalde of the district of San José, in Upper California—in the possession given by the said officer of the quicksilver mine situated in his jurisdiction, to Don Andres Castillero, in December, 1845.

"2d. An absolute and unconditional title of two leagues of land to Don Andres Castillero, specifying the following boundaries:—On the north by the lands of the Rancho of San Vicente and Los Capitancillos; on the east, south and west by vacant lands or vacant highlands.

"3d. The dates of these documents will have to be arranged by Don Andres. The testimony of them taken in due form, and besides certified to by the American Minister in Mexico, and transmitted to California as soon as possible.

"Tepic, May 27, 1849."

James Alex. Forbes to William Forbes. Dated San Francisco, Oct. 28, 1849 (*p.* 392).

* * * "I must again call your attention to the importance of my suggestions relative to the perfecting the title

of the mine of New Almaden, and without entering now into the particulars already explained to yourself and to Mr. Alex. Forbes verbally, I desire only to impress upon your mind the vast importance of securing from the Supreme Government of Mexico the documents comprised in the memorandum left with Mr. Alex. Forbes, when I was in Tepic, for Castillero. By my other letters by this conveyance you will be informed of all the particulars of the transactions that have occurred recently in the affairs of the mine, and you will see the risk in which this valuable property is placed by the delay that has occurred in the acquisition of the documents referred to." * * *

James Alex. Forbes to William Forbes. Dated San Francisco, 28th Oct., 1849 (*pp.* 844, 846).

* * * "My reasons for purchasing the land of that part of the farm of the Berreyesas which I pointed out (to Mr. Alex. Forbes and yourself) on the map of New Almaden, are—1st. Because I fear the destruction of some important papers of the original registry of the mine, and which I believe will be effected, or that on those very documents of registry a question will arise as to the legality of the possession. 2d. Because no posterior grant of the Government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated in the original expediente of registry. 3d. Because I am convinced that Walkinshaw and his party have endeavored to make the purchase of the land, fearing that the denunciation will prove fruitless; in all of which cases they will come forward as the owners of the land comprising the mine and hacienda. Therefore it is a great risk for me to disregard the claims of the Berreyesas, and to set up a dispute upon boundaries, when I am uncertain as to the production of the documents held by Walkinshaw, and of the validity (in the accursed courts of this country) of the original registry of the mine." * * *

"I now desire to call your attention to the following important matter. In order to secure the possession of the land which was granted to Castillero and his associates, upon the mining possession of New Almaden, you must bear in mind that that document was not recorded in this country, but that it remains in the hands of Walkinshaw; that in all probability it will be destroyed, if it has not been destroyed already. That in view of these facts and the deep plans laid by Walkinshaw, it behoves you to obtain from the Supreme Government of Mexico the full and positive grant of the two

sitios of land upon the mine of New Almaden, under the date of the order to Castillero from Castillo Lanzas, bearing in mind that this grant must express the entire approbation of the Supreme Government, of all the concessions made by the local authorities, or Alcades of the district of San José, of the original grant or registration of the mine. That grant must be recorded under the date of its concession, and certified copies of the whole must be obtained and authenticated by the British Consul at Mexico, and at the earliest possible moment be sent to me.

"The boundaries must be expressed as joining on the north and northwest by lands of the Ranchos de San Vicente and de los Capitancillos, and on the east, south and west by Serrania or terrenos Valdios." * * *

James Alex. Forbes to Alexander Forbes. Dated Santa Clara, October 30, 1849 (pp. 393, 394).

* * * * * "You will now readily perceive the great importance of my advice to you to purchase a part both of the lands of Cook and of the Berreyesas. You were of the opinion that this measure would not be necessary in view of the supposed facility of getting the title to the mine perfected in Mexico.

"It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent to me as soon as possible. On the one hand I depend upon the precarious and illegal possession of the mine granted by the Alcalde of this District to Castillero, who was in reality the judge of the quantity of land given by the Alcalde, and on the other side I am attacked by the purchasers of the same land, declared by Castillero himself to comprise the mine. In the absence of the all-important document of the ratification of the possession so given, I am compelled to purchase the part of the land of the Berreyesas which Walkinshaw and his party have offered to purchase, and you must not be surprised if I shall go far beyond the price that they have offered, because it is the only mode of securing the title to the mine and hacienda; for if Castillero should fail in getting the desired documents from Mexico it is the sole mode of safety of this property * * * * * and I do entreat you to use every effort to send me the document of the ratification of possession of the mine, and the grant of land thereon, at the very earliest opportunity, properly authenticated and certified as explained by me when I was in Tepic."

James Alex. Forbes to Messrs. Barron, Forbes & Co., Tepic. Dated Santa Clara, 18th November, 1849 (*pp.* 952, 953).

* * * * "The ultimate object of Mr. Walkinshaw is to make it appear that the first possession of the mine is illegal, and very probably, by destroying the principal documents still in his possession, he expects to attain his iniquitous ends. Those documents are not recorded in California. I speak of the grant from the General Government, and the contract of habilitation. * * * *

"You will readily perceive the necessity of attending to the purport of my private letters already remitted to you; and I hope that you will not fail to carry out the end therein expressed. Please bear in mind that all documents authenticated in foreign parts, to be available in an American court of justice, must be certified by an *American Consul* or *Minister*, at that foreign place whence such documents emanate. * * * *

"All these difficulties will be set at rest in a definite and final manner, by sending me the documents I asked of you in my precited letters, to which I pray your strict attention." * * * *

Barron, Forbes & Co. to James A. Forbes. Dated Tepic, Nov. 30, 1849 (*pp.* 394, 395).

* * * * * * "We have perused with much interest and attention the whole of your letters and documents received by the steamers, the 'California' and 'Panama,' and we beg you will excuse us from minutely entering into a reply to those valuable and important papers. * * * * Castillero, we expect, will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted." * * * *

Alex. Forbes to James A. Forbes. Dated Tepic, 30th Nov. 1849 (*pp.* 395, 396).

* * * * "We are quite of opinion with you that we should not be lulled into security, from the belief that other proceedings will not be resorted to; and that principle will be acted upon, and every support from this will be given to what you may point out as necessary." * * * *

Alexander Forbes to James A. Forbes. Dated Tepic, 1st Dec., 1849 (pp. 396, 397).

* * "The document sent up to you by the last steamer for the grant of the lands to D. Andres Castillero was by mistake not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there.

"The one sent you was directed at foot to the Governor of California, and the one deposited at Monterey was directed to D. Andres Castillero. The difference is, that by one the delivery by the Governor was perhaps necessary to make the grant valid, whereas the other being addressed directly to D. Andres, did not require that formality, nor was any other proceeding necessary, thus making it a better document than the greater part of the other titles for lands in California. I fear you may have made use of the notarial copy sent—if not, you will of course apply for the copy of the one at Monterey; I, however, have hopes that your well known cleverness will have enabled you to find out this mistake, which would show itself, if you had applied for the document from Monterey. At all events, you may he enabled to withdraw the one sent and substitute the other; either, however, I take to be as good as the usual California titles, few of which have been officially delivered or sanctioned by the local authorities.

"Another difficulty, however, occurs. A document was made out in the city of Mexico when I purchased the Bars from Castillero, for the purpose of securing his consent and approval of the contract of Habilitacion; in this document is also inserted the grant of the two sitios, being an exact copy of what has been sent you and directed to the *Governor*. All this will show you how that matter stands. And as I think this document may be of use to you, I send a copy of the whole, leaving you to your own good judgment, to make such use of this document, and of what I communicate, as you shall think proper.

"I shall send the document alluded to in a separate cover to Probst, Smith & Co." * * *

James Alexander Forbes to Barron, Forbes & Co. Dated New Almaden, December 20th, 1849 (pp. 846, 847, 848).

"GENTLEMEN:

"I have the pleasure to reply to your esteemed favor, dated the 13th ult., enclosing a certified copy of the grant of

the two sitios of land to Don Andrés Castillero upon this mining possession; and in obedience to your request, I shall now state why this document is not sufficient to secure this property from the insidious attacks of Mr. Walkinshaw and his associates, or other villains, who are awaiting an opportunity of annulling the title of the same.

"The grant, after making allusion to the proceedings of Castillero and the local authorities, without any explicit statement, goes on to state that two sitios of land are conceded to him *como colono* upon the mining possession of the quicksilver mine he discovered in the *Mision of Santa Clara;* while the original documents of the mine and the contract of habilitacion declare that the mine is situated on the lands of José Reyes Berreyesa. * * *

"In order to remedy the great oversight of Castillero in omitting the particular identification of the two sitios of land and the positive approbation of all the acts of the local authority of California in the concession of the mine, the following is the method to be pursued with the least possible delay: Castillero, or some other fit person, must obtain from the Supreme Government of Mexico a positive, explicit, and unconditional grant of the two sitios of land. In this document, particular reference must be made to the concession of the mine by the Alcalde of San José, approving of the said concession, and conceding to said Castillero and his associates, in place of the three thousand varas, the said two sitios of land, citing dates, and making that of the said grant to correspond with the imperfect and ambiguous document of which you have sent me the copy. Of course Castillero will be aware of the necessity of having this document recorded in Mexico; and perhaps it would be advisable, for his information, to state to him the boundaries expressed in my letters to Messrs. William and Alex. Forbes, with any other particulars that may be requisite in order to enable him to accomplish the desired end. I know not what conditions Castillero may have proposed to the Supreme Government of Mexico; but whatever they may have been, they of course cannot be fulfilled in California, by reason of the change of government. No juridical possession was given of the two sitios of land, which constitute in reality that occupied by this hacienda, but which the document granted to Castillero declares to be in the Mission of Santa Clara, between the lands of which and this mine there is a space of five leagues of land belonging to private individuals. * * *

"I pray you will not be deluded into any belief that there

will be no necessity for obtaining the document herein described." * * *

Alexander Forbes to James A. Forbes. Dated Tepic, January 7, 1850 (*p.* 399).

* * * "Castillero is still somewhere in Lower California. We have not heard from him, but he must be somewhere about La Paz." * * *

Alexander Forbes to James A. Forbes. Dated Tepic, February 3, 1850 (*pp.* 400, 401, 402).

* * * "I had the pleasure to write you of date the 7th January, which went by last month's steamer, to which I refer. I have since received your letters by Reyes, dated the 27th and 31st Dec. and 8th of Jan. I shall not go minutely into the whole valuable information you give me, nor into the statements so very interesting to myself and those concerned in the mine of New Almaden. * * *

* * * "Castillero has returned and is also here; so am I and William Forbes. * * *

"I have every reason to believe that the documents you mention will be *found* in the city of Mexico; and as Mr. Castillero will return there they will no doubt be procured; but we are at some loss to know what is exactly wanted, and I beg you will, by next steamer, give a sketch of the documents you allude to, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two sitios *directly* to Castillero, and registered in Monterey, nor am I sure if this will mend the matter. In a few days, however, we will again hear from you, and act accordingly. * * *

"We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas given by the Alcalde on giving possession of the mine. As a doubt may be started as to whether the Alcalde, acting as the 'Juez de Mineria,' had a right to make this grant; yet if approved of by the Government of Mexico before the possession of the country by the Americans, there could be no doubt on the subject. This takes in our hacienda, and unless opposed by the Berreyesas, would, I should think, settle the question.

"Castillero says such approval was given, and that on his arrival in Mexico he will procure a judicial copy of it. This

is the plan we shall adopt, if we hear nothing from you to alter this resolution. Since writing the foregoing, I have looked over your private letter to William Forbes, dated 18th October, and find you state the limits or boundaries as follows:

"'The boundaries must be expressed as joining on the north and northwest by lands of the ranchos of San Vicente and de los Capitancillos, and on the east, south, and west by Serainia, or "tierras baldias."'

"Castillero is not certain of accomplishing this latter plan, and thinks the first, that is, the three thousand varas, the best."

James Alexander Forbes to Alexander Forbes. Dated New Almaden, Feb. 26, 1850 (*p.* 403).

* * * "Your favor of the 3d instant came duly to hand, and in answer to that part of it relating to the documents, sent up to me in November, serving as titles to this property, I will again address you 'por seperado.'

"I really did have more faith in the tact and ability of Castillero to perceive the important objects set forth in my memorandum of what was to be done, nine months ago in Mexico, by that eccentric individual, and that with the powerful influence that he was to have exercised by the efficient aid that was to be lent to him, he would meet with no obstacle to the attainment of the important documents explained in that memorandum. But Castillero has deceived himself; for he thought that boundaries were not necessary; as I shall presently show you. He succeeded in obtaining the grant of two sitios to himself on the mining possession of *Santa Clara*, while that very act of possession declares that the mine is situated on the land of one José R. Berreyesa, five leagues distant from Santa Clara, and you will at once perceive that such a discrepancy would not fail to attract the attention of the U. S. Land Commissioners, and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

"Without troubling you with what I have so many times written and explained to you verbally, on the importance of the acquisition of the *document*, I will only say now what it *must* be, and it is this:

"1st. A full and complete ratification of all the acts of the Alcade of this jurisdiction in the possession of the mine.

"2d. A full and unconditional grant to Castillero of two sitios of land covering that mining possession, expressing the

boundaries stated by me in the memorandum I left with you in Tepic. Both of these documents to be of the proper date, and placed in the proper governmental custody in Mexico; and

"3d. The necessary certified copies of them, duly authenticated by the American Minister in that capital, taken and sent to me at the earliest possible moment." * * *

Barron, Forbes & Co. to James A. Forbes. Dated Tepic, 2d March, 1850 (*p.* 404).

* * * "Mr. Barron and Don Andres Castillero are about to proceed to the City of Mexico, and will attend to what you have recommended." * * *

A. Forbes to [*James Alex. Forbes*]. *Dated Tepic, 11th March*, [1850] (*pp.* 404, 405).

* * * "Mr. Barron and Castillero have gone off to Mexico, and I write them to-day respecting the document you know of, which if possible will be procured." * * *

Alex. Forbes to James A. Forbes. Dated Tepic, 7th April, 1850 (*p.* 405).

* * * "Mr. Barron and Castillero have arrived in Mexico, and have every prospect of finding the documents you are aware of, and which will of course be forwarded as soon as possible." * * *

The last act of J. A. Forbes.

This second examination of J. A. Forbes was closed June 30, 1858, (p. 848).

The Government next offered evidence of an alleged letter from Alexander Forbes to J. A. Forbes, dated March 28, 1848 (p. 864). The witnesses produced to verify it were the same J. A. Forbes and a connection of his named Robert Birnie.

Birnie resided at Oakland (p. 850). He was a half-breed Indian (p. 2775). He had been, in 1848, a clerk to J. A. Forbes at the mine (p. 284, 850, 851), was

thenceforth very intimate with him (p. 857, Q. 8, 9), and married a niece of J. A. Forbes' wife (p. 874).

At the time of J. A. Forbes' re-call for further cross-examination by claimants in June, 1858, Birnie attended at San Francisco, on J. A. Forbes' request, by telegram, and was considerably in his company (p. 874, Q. 10 to 18, p. 898, Q. 221 to 223).

Birnie, when called as a witness, (among other things) stated as follows: He was frequently in court during J. A. Forbes' examination in 1857 (p. 858, Q. 12, 13). At that time he sought "to be employed by Mr. William E. Barron." He "believed" that Mr. Barron engaged him to endeavor to procure "the copy of the communication from Castillo Lanzas to the Governor of California, which was referred to in the letter of Alexander Forbes to J. A. Forbes, dated Tepic, December 1, 1849, as being directed to Don Andres Castillero, and deposited by A. Forbes in Monterey" (p. 858, Q. 14 to 18, p. 851, Q. 21 to Q. 38, 41, 60, 65 to 71).

He further testified that he was also employed by Mr. W. E. Barron and Mr. Billings, to get from J. A. Forbes any documents or papers "that were prejudicial to the title to the mine of Almaden, or any papers that Mr. Forbes might have in his possession for or against it" (p. 860, Q. 26).

He further testified that about February, 1858, J. A. Forbes told him that he had in his possession a paper or papers "that would blow the title of the mine of New Almaden sky-high," but without describing the paper or stating whether it was a letter, or what sort of a paper it was (p. 860, Q. 27 to 33).

He said that in the middle of June, 1858, he reported to W. E. Barron his unsuccessful search for the Monterey document; told him he "understood Mr. Forbes had a document that would injure their case," and that Mr.

Barron gave him $30 to get a copy of it (p. 859, Q. 18).

He further testified about this letter as follows:

"The evening before Mr. Forbes' last examination (*i. e.*, June 29, 1858), * * Mr. Forbes exhibited the letter to me. I then reported next morning (*i. e.*, June 30, 1858), * * * that it was a letter in the handwriting of Alexander Forbes; I told them the contents of it. Mr. Barron then asked me if Mr. Forbes would be induced to part with it" (p. 861, Q. 33).

He further testified "that somewhere in the latter part of June, 1858, at a room in the Railroad House" in San Francisco, he, Birnie, made a copy of the letter. That he got permission to take the copy by asking Forbes "as a great favor."

"I told him (J. A. Forbes) the reason I wanted a copy was, to show Messrs. Bolton and Barron that I faithfully performed my duty; he at first objected, and said he was going to deliver the document into the hands of the United States District Attorney. I begged of him not to do it until he had given me a copy. He finally consented to do me that favor" (pp. 853 to 855, Q. 46 to 58, 59).

He further testified that on July 1st, he tendered this copy to Mr. Barron, who handed it back to him, but he nevertheless left it. Mr. Barron declined to purchase the original (p. 855, Q. 61 to 64–p. 859, Q. 19 to 22). In reference to this interview he testified as follows:

Q. 22. "I did tell Mr. Barron that Mr. Forbes told me he was not willing to assist Mr. Laurencel, and that if in case that he took a notion to dispose of that document he would rather sell it to them (the Co.); but that he did not feel disposed to part with it for money; all that he wanted he was trying to clear himself from reports and attacks that were circulating around through the lawyers and agents of Bolton & Barron; after Mr. Barron had seen the copy he declined to buy. He said if he felt disposed to sell it, he would rather let the Company have it at one half the price that he would sell sell it to Mr. Laurencel."

The alleged copy of this letter was brought into

the case as evidence, like Mr. Davidson's box, in a method somewhat dramatic.

On July 14, 1858, the District Attorney moved that these two witnesses, Robert Birnie and J. A. Forbes, might be examined on one hour's notice, showing for cause "that it is indispensable to the interests of justice and of paramount importance to the U. S. that said witnesses should be examined without delay." And Birnie having been called and testified as aforesaid to a copy of the alleged letter, the claimant's counsel on demand produced the said copy which had been left with Mr. Barron.

See the order of Court, p. 849.
" *Birnie's testimony, p.* 850 *to* 863.
" *the two copies of letter, p.* 864, 865.

Grounds of belief that the letter of March 28, 1848, was the result of a conspiracy formed by J. A. Forbes and Birnie, and consummated by forgery and perjury.

.1

Birnie was examined and dismissed without the slightest hint to the claimant's counsel that the original of the pretended letter was to be lost. When that peculiar fact was put forth by J. A. Forbes, *he* was critically cross-examined His *story* about the alleged loss *and making of copies*, with all its repetitions, will be found in the following parts of his examination.

Cross-Ex. p. 895, *Q.* 193 *to* 196.
" " *p.* 898, *Q.* 210 *to* 212.
" " *p.* 899, *Q.* 224 *to end of p.* 910.
Re-direct " *p.* 946, *Q.* 1 *to* 7.

J. A. Forbes, July 16, 1858, testified (p. 869, Q. 14, 15) that his former examination in this case closed on June 30, 1858, at 5 P.M., that said letter was then

in his coat pocket. That he suffered Birnie to make a copy of it, and, at 9 o'clock in the evening, having occasion to leave his lodging room in the Railroad House for a short time, he, for security, took the letter out of his coat pocket and put it into his carpet bag, locked his room door, taking the key with him (p. 905, Q. 284), and left. That he returned to his room in about half an hour and found the door locked, as he had left it. "On retiring to bed," says he, "I had occasion to go to my carpet bag, when I found that that letter was missing." The occasion of his absence is thus stated:

"I left my room and went below in the dining saloon for the purpose of getting a cup of tea. I found the chairs and tables piled up in that dining room, and that I could not get what I wanted. I returned to my room and deposited that letter in my carpet bag. I came down stairs again, after locking the room; I proceeded to Montgomery street, to a German coffee-house, where I obtained the refreshment I required, and immediately thereupon returned to my lodgings for the purpose of retiring to rest. On examining my carpet bag, I found that that letter was missing. I then went to bed" (p. 900, Q. 240).

The carpet bag was left locked; he did not find the lock broken on his return; nor did he ever take any steps to ascertain what had become of his letter (p. 905, Q. 284 to 289).

Six days afterwards, *i. e.*, about 6th July, 1858, he sent a copy of the letter to the District Attorney, stating the loss (p. 907, Q. 301, 302, 307).

2.

From this further cross-examination of J. A. Forbes, it appeared that in March, 1848, A. Forbes went to Monterey, where he remained some short time, and thence took his passage to Mexico. He did not again visit California.

J. A. Forbes states that he had *the original* in his possession on June 30, 1858. At this time Alex. Forbes was an aged man residing in the city of London.

This drama, which may be called the *Presentation of the Letter*, commenced, in any view of the matter, no earlier than June 30, 1858. It closed July 31, 1858 (p. 945).

J. A. Forbes was interrogated as to other letters passing between him and A. Forbes during the brief stay of the latter at Monterey, in March, 1848.

The counsel for the claimant then produced the draft of a letter from A. Forbes, at Monterey, to J. A. Forbes, at Santa Clara, dated March 20, 1848, with J. A. Forbes' answer to it, dated Santa Clara, March 22, 1848.

Exhibit O. H. X., No. 15, *p.* 954.
Exhibit O. H. X., No. 17, *p.* 956.

J. A. Forbes identified these as genuine, notwithstanding that the reference in his letter (by some unexplainable mistake) was to a communication dated 19th (p. 945, Q. 445, 446).

The counsel for the claimant also exhibited to him the draft of a letter from Alexander Forbes to him, dated Monterey, March 25, 1848, purporting to be a reply to his said letter of March 22, 1848.

This draft is *Exhibit O. H. X. No.* 16, p. 955. J. A. Forbes repudiated the draft in these words: "There is matter contained in it which was never written to me, and there is matter contained in it which is comprised in the letter of the 28th of March, 1848" (p. 945, Q. 446).

A perusal of the draft letter of A. Forbes, dated March 25, 1848, supposing it to be genuine, would convince any one that J. A. Forbes had suppressed the letter of which that was the draft, and substituted for

it a forgery of his own, *i. e.*, the pretended copy, dated March 28, 1848, just as he did on a prior occasion. *Brief, p.* 124. It was necessary, therefore, that J. A. Forbes should repudiate the draft in question. And he did so. But how can any one doubt its genuineness? It was impossible to have sent to London for it, and procured it within the time which had elapsed between 30th June, the date at which J. A. Forbes pretends that he lost the original, and Birnie communicated its contents to Castillero's grantees, and the 31st July, when this draft was produced to impeach the pretended copy (p. 902, Q. 267, 268—p. 861, Q. 30 to 33).

The other acknowledged correspondence between these parties at the period in question affords very satisfactory evidence that the draft, dated March 25, 1848, is genuine, and fixes upon the pretended letter of March 28, 1848, the brand of forgery. It is completely alien to the series; it could not have belonged to that correspondence.

See A. Forbes to J. A. Forbes, March 20, 1848 —*p.* 954.

See J. A. Forbes to A. Forbes, March 22, 1848, *in reply—p.* 956.

See pretended letter of A. Forbes, March 28, 1848—*p.* 864.

See J. A. Forbes to A. Forbes, June 28, 1848—*p.* 957.

A comparison of their contents will show that the pretended letter of March 28, 1848, does not fit at all, whilst the draft of March 25 (p. 955), is precisely fitted to be a link in the series. The letter of J. A. Forbes to A. Forbes, dated June 28, 1848 (p. 957), is a natural close to this series. Prior to any of these March letters, the two Forbes' had an interview at Monterey, in

that same month (p. 911, Q. 329 to 345). The letter of *June* 28 states that A. Forbes *then*, that is, at that interview in March, "assumed a hostile attitude" (p. 959) towards *J. A. Forbes.* This correspondence shows that thenceforth until and after A. Forbes' departure from California, *J. A. Forbes* considered A. Forbes as opposing his interests and injuring him. It also shows that A. Forbes, all along, knew this, and knew that J. A. Forbes entertained strong emotions of resentment.

The immediate subject of all these letters, as well the undisputed as those which are disputed, was a pending negotiation for the purchase of certain *barras* or shares in the mine by A. Forbes from J. A. Forbes, as agent for the brothers Robles.

The fictitious letter of March 28, 1848, refers to the wide difference of opinion existing between the two Forbes' as to the value of these shares, and introduces as his, A. Forbes', "only reason for investing a dollar in the negotiation," the astounding fact that "the documents procured by Castillero in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans" (p. 865). Now, the very point of J. A. Forbes' letter of June 28, 1848, was to reject, peremptorily, A. Forbes' offer to purchase the *barras*, as too low. That letter is full of censures against A. Forbes. It says: "I feel it to be my duty to question the validity of your contract as *habilitador* of the mine," and calls upon A. Forbes to name an agent in California, "to meet and rebut" his, J. A. Forbes', threatened suit.

Amid all this scolding there is not the remotest allusion to the terrible disclosure of March 28, 1848, nor any hint that J. A. Forbes possessed any dangerous secret.

Nor is there to be found in the evidence anywhere

the slightest attempt to account for Mr. A. Forbes' putting into a letter on March 28, 1848, such a disclosure to one whom he was then operating against, and who, on the 22d, had thus written to him: "You declare that I have arrayed myself in defiance against you, and that you will take measures to counteract all I can do!"

The intrinsic evidence afforded by the correspondence of this period, that the copy of March 28, 1848, is a fraudulent forgery by J. A. Forbes, is overwhelming.

J. A. Forbes' motive for deviating from the date of the true letter, when he was making up a forgery, is also reasonably apparent. On his former production of alleged copies, made by himself, one of his fabrications was discovered by the subsequent production of the very letter which he really wrote (pp. 392, 844). He thus learned by experience to avoid, if possible, this test of truth.

See the fabricated copy, dated Oct. 28, 1849. *Exh. O. H. No.* 3, *p.* 392.

See the true letter of same date, Exh. O. H. X. No. 12, *pp.* 844 *to* 846.

The Tepic memorandum of May 27, 1849 (p. 391), is, no doubt, a forgery. The only letter which refers to is that of J. A. Forbes, dated Oct. 28, 1849 (p. 392). The subsequent production of the true letter, written at that date (p. 844), is certainly most conclusive evidence that the pretended copy is a fraudulent fabrication.

3.

J. A. Forbes, on this last examination, pretended that his letter of March 28, 1848, had not been exhibited to Laurencel in the original negotiations, merely because

"he had then mislaid it" (p. 897, Q. 202, p. 895, Q. 197). Previously, on his cross-examination in the fall of 1857, he swore that he had produced to Laurencel *all* his "private" letters, without qualifying his statement with any reference to a loss (p. 459).

And he swore, on his last examination, that he perfectly remembered this letter at the time of showing the others to Laurencel (p. 897, Q. 203).

4.

The manœuvring which was in constant progress between Laurencel, J. A. Forbes, Mr. Randolph, as special representative of the U. S., and between Forbes and Birnie touching the examinations of J. A. Forbes, deserves notice as affecting the credit of both; and especially as it bears on the next point.

When Forbes was under cross-examination concerning his letters, on his first examination in 1857, the claimant's counsel seem not to have had at hand the three letters produced by them subsequently in June, 1858. When these latter three letters came to hand there was this difficulty about producing them: J. A. Forbes' examination had been closed, and, perhaps, the claimants could not recall him without making him *their* own witness. There was some skirmishing on this point. The first order for his re-examination was modified (pp. 834 to 836): "The District Attorney stipulated with counsel (for claimant) that, provided no new matter was introduced, [J. A. Forbes] should still be considered as a witness for the United States" (p. 874, Q. 19).

As a matter of course, the claimant's counsel adhered to their stipulation. J. A. Forbes' examination was confined to the three letters (p. 837 to 841).

When Forbes and Birnie came in to verify the bag and letter statement, they evidently conspired together to

represent this reticence of the claimant's counsel as the result of an alleged warning given by Birnie to the claimant's agent, Mr. Barron, that it would not be best to push J. A. Forbes too hard.

Testimony of Birnie, p. 862, Q. 1:

"Did not the fact that J. A. Forbes was about to be examined for the second time in this case induce him to show you that letter, in order that you might make it known to the claimants before the examination?

"*A.* 1.—He was to be examined the next morning, and told me now he had a chance to expose the title of the mine; I told him for God's sake let me see what it was; he then showed me as a friend, and told me if I took such interest in favor of Bolton & Barron, that if he was questioned about any documents in his possession he was bound to present it to court; I told him not to do it, and told Mr. Barron to tell Mr. Peachy not to question Mr. Forbes as to anything about any papers that he might have in his possession."

Testimony of J. A. Forbes, p. 944.—"The reason why I did not present that letter on my examination of the 30th of June last is fully stated in my preceding answer. I did not hang back, neither was provocation urged or opportunity invited for me to present that letter. The examination was short, and counsel for claimants asked me to identify two or three letters and another document." On the next day he had leave to add (p. 945): "I have to say, in further explanation of the question, that in the examinations referred to the counsel for the claimant was extremely moderate and forbearing in his questions to me, for the reason, I presume, that he had been informed by Mr. Barron that he, Mr. Barron, had been made aware of the contents of that letter."

See further from p. 947, *Q.* 6, *to p.* 949, *Q.* 6.

5.

How far is there any evidence to sustain the verity of this alleged copy?

J. A. Forbes stands discredited without an attempt at defence. Ten witnesses impeach him as unworthy of credit.

But *Robert Birnie* swears to its genuineness. There

is literally no evidence of its verity unless his credibility can be sustained.

Nineteen witnesses, whose means of knowledge were ample, testified that Birnie was a man of desperately bad character and unworthy of credit (pp. 2755 to 2801). Sixteen witnesses testified that they knew no reason to the contrary, and therefore would credit him on oath (pp. 2865 to 2904). All or nearly all of these supporting witnesses had had very slight opportunities of knowing anything concerning him. And, independently of the general incredibility of this bag and letter story, it was distinctly shown that Birnie committed perjury on his examination in this case.

After he had stated that on the morning after he obtained the copy of this letter from Forbes, i. e., 1st July, 1858, he, Birnie, showed it to Mr. Barron, who declined to purchase the original, he was thus examined (p. 861, Q. 34 to 36):

Q. 34.—How long was it after Mr. Barron declined to purchase this original letter, that you spoke to any one else on the subject?

A. 34.—I do not recollect of mentioning it to Mr. Forbes. Mr. Forbes was gone before I presented the copy to Mr. Barron.

Q. 36.—Am I to understand that before you came here yesterday to give your testimony, you had never spoken to any one of the matters concerning which you testified?

A. 36.—No, I do not recollect of mentioning any of them; the first notice that I had was from a subpœna to appear here instanter; I came over in the boat yesterday with Mr. Randall, the deputy marshal; Mr. Forbes and Mr. Laurencel were in company with the deputy marshal; I went to Mr. Forbes and asked him the object of this subpœna so suddenly; he told me that it was to testify about the copy of the letter I got from him; I then told him he was acting very unfriendly towards me in letting Mr. Laurencel or any other party know that I had any transaction with him about the matter, and that there was nothing that I abhorred so much as to expose any private transactions that I have with my employers; Forbes said that he could not help it—that I was under the

marshal's hands; I never left the marshal until I came in this room to examination.

J. A. Forbes confirmed the statement that he did not see Birnie on 1st July, 1858; he having gone to his home at Santa Clara early on that day (p. 900, Q. 246 to 249).

But upon the other vital parts of this statement, J. A. Forbes was compelled to contradict Birnie. With his *subpœna*, and accompanied by Laurencel and J. A. Forbes, the deputy marshal, on his trip from J. A. Forbes' residence at Santa Clara to San Francisco, arrived at Oakland, Birnie's residence, on July 13th, 1858, the very night before Birnie was examined.

Forbes testified as follows (*p.* 876):

Q. 33.—Did you see Birnie as soon as you got there?

A. Shortly after.

Q. 34.—Was he waiting for you when you arrived?

A.—He was not; he had no idea of my going there?

Q. 35.—Was it by mere chance that you met him there?

A.—It was not by mere chance. The United States marshal had a subpœna for him to appear before the commissioner; I went to see him at the request of the marshal, or rather by his consent, thinking it would be less disagreeable to Birnie to speak to him before the subpœna was served on him, as the subpœna called for his appearance *instanter*.

Q. 36.—Where did you find Birnie, and about what hour?

A.—At his own residence, a little after nine o'clock in the evening.

Q. 37.—How did you break to him the news that there was a *subpœna* out requiring him to testify *instanter*, on the part of the United States, in this case; how did he receive the tidings, and what passed between you at that interview on that subject?

A.—I simply told Mr. Birnie that the United States marshal was there and had a subpœna for him; that he would not be required to go to San Francisco until the following morning, provided he would be ready to go at five o'clock in the morning. Mr. Birnie was surprised, but said he would agree to go in the morning. I then left to see the marshal, and informed him that Mr. Birnie would meet him in the morning at the stated hour.

Q. 38.—Where did you find the marshal?

A.—At the hotel where we stopped, about two blocks from the residence of Mr. Birnie.

Q. 39.—What was the name of the United States deputy marshal who had the *subpœna* for Mr. Birnie ?

A.—I stated before that it was Mr. Randall, the same officer who served me.

Q. 40.—When it was so easy for Mr. Randall to go from the hotel to Mr. Birnie's house, why did he not serve the subpœna on him that night ?

A.—It was pretty dark, and Mr. Randall did not know exactly where Mr. Birnie lived.

Q. 41.—But you have said that you obtained Mr. Randall's consent to visit Mr. Birnie, so that Mr. Randall must have known that you knew where he lived : why didn't he ask you to show him the way ?

A.—It was the intention of Mr. Randall, the deputy marshal, to serve the *subpœna* on Mr. Birnie immediately after his arrival at Oakland ; but we having arrived late, and I knowing that Mr. Birnie's family would be alarmed if the officer went there suddenly at that hour of the night, requested him to allow me to inform Birnie first, and he accorded me his permission.

Q. 42.—What is there in the nature of a subpœna or Mr. Randall to alarm Mr. Birnie's family ; please to state through what course of preparation to meet the subpœna and Mr. Randall you put Mr. Birnie's family ?

A.—Mr. Birnie's lady is a native of the country ; she does not understand the nature of any judicial process ; she is very timid, and I believe in a delicate state of health ; and therefore I judged it would be proper to break the matter to Mr. Birnie myself ; as regards the officer, Mr. Randall, nothing could be apprehended from his personal appearance ; but nevertheless the simple fact of his visiting Mr. Birnie's at that hour, and on that errand, would have alarmed his family.

Q. 43.—Why need Mrs. Birnie have known that Mr. Randall was United States deputy marshal, or that he had a *subpœna ?* You state that Mrs. Birnie's delicate health, in your opinion, made it proper for you to make known to Mr. Birnie the object of Mr. Randall's visit ; explain how this was.

A.—Had the United States officer gone to the house of Mr. Birnie, he would have found his family in bed, as they were in fact retiring to bed when I arrived, and as a matter of course would have become aware that something uncommon was about to take place, and would necessarily have been much alarmed ; but, on seeing me, she would have been, or was, assured that no danger would befall her husband.

Q. 44.—Did you explain to Birnie the reason why he was called by the United States as a witness, and what was expected to be proved by him, when you visited him that night?

A.—I simply stated to Mr. Birnie that he had been subpœnaed to appear immediately to testify on the part of the United States in this case, and that it was expected he would testify truthfully to such interrogatories as might be put to him.

Q. 45.—Who was it that expected Mr. Birnie to testify truly?

A.—I don't know of any person in particular.

Q. 46.—To whom did you refer when you told Mr. Birnie he was expected to testify truly?

A.—I did not refer to any particular person.

Q. 47.—Was Mr. Birnie aboard the steamer next morning?

A.—He was, and served with a subpœna by the United States marshal.

Q. 48.—Did you take Mr. Birnie on board, or did he seek the United States marshal?

A.—I did not take him on board; he agreed to meet the marshal about half-past four or five; he did meet the marshal, who served the subpœna on him, and he went on board with him.

Q. 49.—Did you have any conversation with Mr. Birnie while coming over to San Francisco?

A.—Yes, sir.

Q. 50.—State what.

A.—We conversed upon different subjects; about the Frazer River excitement, as he had wished for me to send two of my sons up there with him. Mr. Birnie told me he had been paid by Bolton, Barron & Co. the amount of four hundred dollars, and that he wanted to go and see them on his arrival in this city, to inform them that he had been suddenly subpœnaed and brought over here, as he felt hurt at it, and in order to remove any wrong impressions from their minds.

Q. 51.—On your visit the night before to Birnie, or in your interview with him on the steamer, was anything said by either of you about the original letter from Alexander Forbes to you, of which Birnie had taken a copy?

A.—I told Mr. Birnie that that letter had been abstracted from my carpet bag in this city; and I think a conversation on the subject was had between us, on both occasions referred to.

Q. 52.—Did Birnie hear it for the first time from you?

A.—It was the first time I had mentioned it to him. I don't know whether he had heard it from others before or not, but from that conversation I feel confident that that was the first time he knew of it.

Q. 53.—Why do you feel so confident?

A.—From my own knowledge of his character, and from the surprise which he manifested when I communicated that intelligence to him.

Q. 54.—May not a very large portion of that surprise have arisen from the fact of your not having before that time communicated to Mr. Birnie the loss of that original letter?

A.—I cannot see how that would follow.

Q. 55.—Did you caution Mr. Birnie against stating, in the course of his examination, that the original letter had been abstracted from your carpet bag?

A.—I did not; and do not recollect having touched upon the matter of his examination, so far as the particularities of it are concerned.

These two men were in the highest degree daring and unprincipled. But their operations were too complicated. In such affairs a screw is apt to get loose somewhere: so it happened in this instance. When J. A. Forbes visited Birnie, on the night of the 13th, he did not tell him that the Deputy Marshal knew of the visit, and of its object. Consequently, Birnie, being unmstructed on the point, swore to a story on the 14th, which J. A. Forbes dared not to confirm. Had he confirmed it, Mr. Randall, the Deputy Marshal, would have contradicted both of them. Besides, the claimant's counsel, Mr. Peachy, was astutely vigilant. He insisted that J. A. Forbes should be absent from the room during Birnie's cross-examination (p. 880, Q. 74 to 77).

Conclusion.

Upon a general inspection of the numerous statements of J. A. Forbes, they will appear to be very conflicting, and palpably false in a great many particulars. But, in

one thing, they are very consistent. He never for an instant, at any time, had the slightest suspicion that any of the documents were forged, or antedated, or in any respect fraudulent.

His idea seemed to be that the letters would lead others to that conclusion (p. 466).

The only way in which he attempted to aid that conclusion by his oral testimony, was in setting up a pretence that he did not learn the existence of the two league grant until quite a late period.

In this attempt he failed utterly.

(P. 459.) *Q.*—When did you first learn of a grant of two leagues made to Castillero on this mining possession by the Mexican Government ?

A.—I do not exactly recollect. I think it was in 1848.

His own letter of July 14, 1847, being shown him (*see it*, p. 541), he was obliged to admit, that he "had been informed" that the two leagues "had been granted to Castillero." A question was then put by the claimant's counsel, to which the Government's counsel objected, as "assuming that the witness had said that the grant did exist at the date of that letter, whereas the witness merely stated that he had heard of such a grant" (pp. 461, 462).

(P. 480.) *Q.*—Who was the person whom you heard say that he had heard Castillero say he, Castillero, had a grant ?

A.— * * Robert Walkinshaw * * informed me that Mr. Alexander Forbes had told him that Castillero had said he had a grant.

Notwithstanding his letter of July 14, 1847, he stuck to it for a long time, that all his information touching the two league grant, was of this round-about character, and merely oral hearsay, though that letter forced him to confess that he had indeed heard of it as early as 1847 (p. 487).

At a later date, i. e., his re-examination in 1858, he was confronted by the production of his letter of May 5, 1847, showing that he had actually seen and read a copy of the grant as annexed to Castillero's ratification of the *avio* executed Dec. 17, 1846 (*see letter*, p. 842 *to* 844, *and testimony*, pp. 837 *to* 841). Being subsequently cross-examined in reference to that letter (p. 923 to 925), he says, on the latter page, in reply to Q. 393 :

"With regard to the matter recommended to Mr. Alexander Forbes by me in my letter of 5th May, 1847, I have to state that the copy of the document exhibited to me at that time by Mr. Walkinshaw purported to be an order from Castillo Lanzas to the Departmental Government of California, to put Castillero in possession of two sitios of land, without any ratification of the possession of the mine given by the local authorities, and hence my suggestion to Mr. Alexander Forbes for the procurement of such ratification."

We here see how truthful he was, and also what early and exact knowledge he possessed concerning the two league grant.

Now as to his *ever* having had any knowledge, information, reason to believe, or actual suspicion, that there was any fraud, forgery, or antedating.

On his first examination in Dec. 1857, he thus testified in reply to questions by claimant's counsel.

Q.—Did you ever tell him (Laurencel) that the claim to the mine of New Almaden was fraudulent ?

A.—I do not recollect that I ever did. * * (P. 466.)

* * *

Q.—Do you know anything connected with that paper (the despatch of Castillo Lanzas) having any tendency to prove that it was made on a day different from that on which it bears date, or that it is not for any reason genuine, or that there has been any fraud whatever in procuring it ?

A.—I am unable to state. I do not know how or when it was procured.

Q. repeated.

A.—I decline answering that question on the ground

that the answer might expose me to a criminal prosecution. (P. 466.)

* * *

Q.—Do you know of any act committed by any person, other than yourself, connected with the original grant, having any tendency to prove its fraudulent character?

A.—I do not. * * (P. 467.)

In June, 1858, after the letter of May 5, 1847 (p. 842), was produced, he was examined concerning it, and said, "Mr. Walkinshaw informed me there was something wrong about the title; that it was incorrect, incomplete, inchoate" (p. 838, Q. 5).

* * *

"According to the expressions in the documents shown me by Mr. Walkinshaw I became aware of the fact that there was a discrepancy, or rather a vagueness, in the document presented to me purporting to be a copy of an order to put Castillero in possession of the two sitios." (P. 841, *Q.* 1.)

* * *

In July, 1858, after he had testified about the pretended letter of March 28, 1848, and produced a copy of it, he was further examined.

The District Attorney, at p. 869, thus interrogated him: "Q. 16. You will now please to state all that you know tending to show the true character of the pretended title set up in this case by the claimant to the mine of New Almaden? Now you can produce your statement."

See J. A. Forbes' written statement, pp. 870 *to* 873.

This statement contains no fact or circumstance throwing the slightest suspicion upon the title.

His cross-examination, from p. 922 to 931, inclusive, showed clearly that, in his mind, there were none but formal objections, either to the Act of Possession or the two league grant.

He here stated that he did not consider the title of Castillero invalid but defective, and that *dates did not enter into the question.* Having his attention called to the inconsistency between this and the point made by the letter of March 28, 1848, he said of the "decree of Señor Lanzas, a copy of which Mr. Walkinshaw exhibited to me: In the document shown to me by him at that time, I of course observed the date appended to that decree. I am free to say that, although I had my doubts with regard to the legality of the proceedings in the Act of Possession, I was entirely ignorant of the facts set forth in Mr. Alexander Forbes' letter to me of 28th March, 1848; and in order to answer pertinently to the question now propounded, I did infer that the title-papers obtained by Castillero, as so stated in that letter, must have been antedated."

It is submitted that he ought to have used the verb in a different tense. He should have said I *do* infer, for the inference seems to have been forced upon him for the first time at this very moment, *i. e.*, July, 1858, by the pressure of the cross-interrogatories.

The letter of March 28, 1848, supposing it for the sake of argument to have been a reality, never, of itself, awakened any such idea.

See his letter of October 28, 1849, a year and a half subsequently to his pretended reception of A. Forbes' said alleged avowal that the titles were antedated. There, after pointing out the technical defects in the existing papers, he says: "It behooves you to obtain from the Supreme Government of Mexico the full and positive grant of the two sitios of land upon the mine of New Almaden, *under the date of the order to Castillero from Castillo Lanzas,* bearing in mind that this grant must express the entire approbation of the Supreme Government of all the concessions made by the local authorities or Alcaldes of

San José of the original grant or registration of the mine. That grant must be recorded under the date of its concession" (p. 846).

In this letter he exhibits a special attachment to May 23, 1846, as precisely the day of all days which he would choose as the birth-day of the Castillero title.

Both on his examination in June, 1858, when the aforesaid original letter of March 28, 1848, was in his pocket ready to come forth on the slightest provocation and "blow" the title of Castillero's grantees "sky high," and in July of the same year, after he had put that thunderbolt into his bag and lost it, his oral testimony was to precisely the same effect as the letter of October 28, 1849.

See his testimony, p. 840, Q. 23 and 24.
See his letter of Dec. 20, 1849, pp. 846 to 848.
And finally see his testimony, p. 931.

Q. 407.—Then, if on the 5th May, 1847, you had known that Castillero had proposed to the Supreme Government of Mexico a contract, one of the articles of which was, that the Supreme Executive should ratify and confirm to him the possession of three thousand varas in every direction from the mouth of the mine, which had been given him by the local authorities in California, and that the Supreme Government had approved the contract proposed by Castillero in all its parts, the only fault which you could have found with Castillero's title would have been that it did not describe with sufficient accuracy the boundaries of the two square leagues of land into the possession of which it directed the Governor of California to put Castillero. Am I correct?

A. 407.—If I had known that Castillero had succeeded n obtaining the documents described in the question I would have believed his title to have been good, with the exception expressed in the question, namely, the want of description of boundaries, which would have subjected the claimants to a litigation with the claimants of the adjoining lands.

THIRD DIVISION.

This division, as before stated in *this Brief*, p. 5. might be deemed surplusage. It is a mere recital of cumulative proofs in respect to facts which, independently of these proofs, are sufficiently established by affirmative evidence, and are not drawn in doubt by any matter contained in this record.

Effect of J. A. Forbes' bag and letter story.

The inaptitude of all the other letters to sustain the imputation of forgery, and their actual tendency to disprove it, were both thrown into the shade by the pretended confession of Mr. Alexander Forbes in the imputed letter of March 28, 1848 (p. 864).

The latter being at this stage, perhaps, *prima facie*, proved, it was accepted as almost conclusive evidence that the Mexican title was an antedated forgery.

With this strong preparative, it seems to have been found practicable to raise a doubt as to the genuineness even of the Alcalde's Act of Possession.

The deposition made by Gen. Halleck in December, 1850, in the Berreyesa suit (*see* this Brief, ante pp.62 to 69), was altogether misunderstood, and that misunderstanding formed the principal, if not the sole basis of this latter suspicion.

Reversing the uniform policy of the Government in favor of free mining in California, a bill in equity was filed, in the name of the United States, against Parrott and others, Castillero's grantees, to restrain them from working the mine during the pendency of this claim. The injunction was granted July 8, 1858.

See U. S. v. Parrott. 1 *Mc Allister' Rep.*, 271 *to* 359.

The claimant's counsel then sought to obtain such full proof from the Archives in Mexico, and from indi-

viduals there, as would remove all doubt. They moved for Commissions to examine foreign witnesses. This motion was opposed, on the ground that the act of Congress under which these proceedings were instituted, did not authorize the reception of any oral testimony except from witnesses produced and examined in California. It was denied.

United States v. Parrott. 1 *McAllister*, 464 *to* 465.

See motion papers in the Record, pp. 1088 *to* 1095.

An application had been previously made to Congress to amend the Act in this respect. But the District Attorney, Feb. 15, 1858, wrote to the Attorney General, stating that the parties possessed great influence in Mexico; that they would use that influence corruptly, &c., and objected to the application, as "its success can only be injurious to the interests of the Government." The Attorney General, concurring in this opinion, addressed to the Judiciary Committee in each House a letter to that effect, on March 21, 1858. And, consequently, the application failed (p. 2949).

Other difficulties presented themselves. On the argument of the motion for a Commission it was urged by one counsel on behalf of the United States, that the Mexican archives could only be proven by the originals whilst another claimed that, at least, exemplifications, under the Great Seal, were necessary. The Court intimated an impression in favor of these objections. The laws of Mexico, however, forbade such a use of the Great Seal. (p. 2927). On Dec. 17, 1858, the counsel for the claimant addressed a letter to Gen. Cass, then Secretary of State, setting forth the circumstances, and requesting that the Executive would apply to the Mexican Government for the original archives or such exemplifications thereof (pp. 2925 to

2929). A month having elapsed without a reply to this letter, the application was further pursued by a letter to the President (Mr. Buchanan), dated January 15, 1859, urging additional reasons in its support (pp. 2929 to 2934).

The President's attention to the subject was again respectfully solicited on the 15th of Feb., 1859. No answer having been received, the counsel for the claimant, for the third time, addressed the President in relation to this "technical difficulty," on March 18, 1859. To the former suggestions the following proposal was now added (p. 2935):

"That the United States shall cause a full examination to be made in the city of Mexico, of all the facts in relation to the title to this mine, and the documents connected with it.

"We are willing that our present Minister and Consul at Mexico and any other disinterested and respectable public officer of the United States, shall act as Commissioners, not only to take testimony in the city of Mexico, of witnesses residing there, but that they shall themselves examine all the documents and archives in the public offices of Mexico, and that their certificate of the facts, as found by them, shall be received as evidence before the courts in these cases. If, however, from the importance of the official duties devolving on these gentlemen, or from any other cause, it shall be deemed improper or undesirable for them to undertake this duty, we propose that the United States themselves select two or three respectable gentlemen, citizens of the United States, who shall act as Commissioners for the discharge of this trust; and after having performed this duty, and taken the depositions of witnesses in the city of Mexico, shall proceed to California to give their testimony, not only in relation to the correctness of the copies of these documents, but to any facts tending to show the fairness or unfairness of the transaction.

"If the United States should decline to pay the whole or a portion of the expenses of such a commission, we are authorized to say that the expense will be borne entirely by the parties whom we represent." * * *

It was at length ascertained that these applications had been referred to the Attorney General. He con-

sidered them all, and reported adversely to them on the 28th March, 1859. *See the Report* (pp. 2938 to 2945). It should be perused at length.

On April 18, 1859, the Counsel addressed to the President of the United States a letter in the nature of an appeal from the Attorney-General's conclusion (pp. 2945 to 2980).

This letter was not answered; and, on 15th December, 1859, the Counsel being unable to find it in the State Department, solicited from the President a copy of their said letter (pp. 3011). On December 17th, 1859, the President replied that this, as well as other letters of which copies were desired, had been referred to the Attorney General. The reasons for his course are thus stated (pp. 3014, 3015):

"I regret that there should have been any apparent want of courtesy toward gentlemen whom I so highly esteem, in not answering your letters; but having determined from the beginning not to interfere with the Attorney General in the performance of his professional duties, either in the New Almaden or any other case, I deemed it proper to send your communication to his office for his consideration. If in the novel and unfounded claim of converting the President into an appellate jurisdiction from the decisions of the heads of departments in all cases where interested parties consider themselves aggrieved, I should undertake to direct the Attorney General in what manner he shall conduct suits in which the interests of the United States are involved, I should have no time left to devote to the important business of my office."

To this declinature of appellate action, the counsel respectfully replied December 23, 1859 (p. 3016).

Whilst these efforts were thus in progress at Washington, the claimant took measures to obtain the personal attendance in California of the Mexican gentlemen who had been government officials at the time of the transactions in question.

Several of these officials arrived in San Francisco, on May 14, 1859 (p. 1245, Q. 175 to 182).

But a number of witnesses, conversant with the matters in controversy, and living in Mexico, were disabled or prevented from performing the journey to California by age and infirmity. Political disturbances in that country restrained some from visiting California. Others did not choose to leave their country merely to oblige the claimant. Reciting these facts, the counsel for the claimant, on April 23, 1859, gave notice to the Attorney General that "under these peculiar circumstances" "they had determined to take * * depositions before the Secretary of Legation or the Consular officer of the United States in the City of Mexico." The notice contained the names of the witnesses proposed to be examined, and stated the facts proposed to be proven. Its concluding sentence was: "We propose to prove by *Bernardo Couto*, *Luis G. Cuevas* and *Miguel Atristain*, who were the Mexican Commissioners for negotiating the treaty with the United States, the facts in relation to that negotiation."

The object of giving this notice was "to enable the United States to cause an appearance to be made on their behalf, to put interrogatories and cross-examine the witnesses when the depositions are taken, if they desire to do so" (p. 2993).

Even this effort to bring before the nation, if not the Court, testimony to be taken *ex parte*, perhaps, which might, at least, serve to protect the reputation of those concerned, was not permitted. On April 23, 1859, the Attorney General addressed the Secretary of State upon the subject. He admitted that "the intent of the opposing party may be fair enough." Although it was to get "twenty Mexican witnesses" to swear to "falsehoods for an association of men who had $15,000,000 staked on their oaths." And he closed with a request that the Secretary would "instruct the

diplomatic representatives and consular officers of the United States in Mexico not to let themselves, or the functions of their offices, be used for the unauthorized and illegal purposes mentioned in this notice, but to abstain altogether from any participation therein" (pp. 2990 to 2992).

Pursuant to the notice thus given to the Att'y Gen., Mr. Eustace W. Barron, on behalf of Castillero's grantees, applied to John Black, Esq., the American Consul, in the city of Mexico, to take the depositions. That officer declined on the ground of instructions from his government. *See correspondence between these gentlemen*, dated, *June 21st, 22d, and 25th*, 1859 (pp. 2987 to 2989, 3119).

The counsel for the claimant, as soon as advised of this alleged "executive suspension" of a statutory right, addressed the Secretary of State, and received from him a statement that the prohibition requested by the Attorney General had been issued from the State Department accordingly. *See correspondence, dated Aug. 2d and 8th*, 1859 (pp. 2989 to 2992).

On Oct. 4, 1859, the counsel for the claimant addressed the Secretary an argument in support of their request, and prayed that the order might be countermanded (pp. 2995 to 3006). The Secretary returned this letter on the 26th Oct., 1859, on the ground that it contained "offensive imputations against the Attorney General" (p. 3007).

Not yet having learned that the President declined to review decisions in the departments, the claimant's counsel, on Nov. 29, 1859, addressed to him (the President) a full and explanatory note, requesting that the instructions to the Consul in Mexico might be revoked (pp. 2980 to 2986).

The claimant was unable to obtain the desired relief at Washington, and was even denied an authenticated copy

of an article contained in the "Polynesian," the Sandwich Island newspaper, from the file kept in the State Department (p. 3012).

The testimony referred to in the notice to the Attorney General, dated April 19th, 1859, (p. 2993), was taken in the summer and fall of 1859, as far as practicable, before D. Antonio Madrid, first civil judge in Mexico (pp. 3097 to 3124).

Whilst these proceedings were thus progressing *ex parte*, in Mexico, before Judge Madrid, on July 9, 1859, Mr. Consul Black addressed a letter to that Judge, denying that he had received any such prohibitory orders as Eustace W. Barron alleged. This would seem to have been merely a technical denial founded on some not clearly developed verbal criticism. Its obvious intent was to cause Judge Madrid to decline taking the testimony (p. 3121).

Notwithstanding this effort of Consul Black, Judge Madrid took the depositions.

But, they are *ex parte;* and, perhaps, this court is not at liberty even to look at them.

In our recital of the evidence in this statement, we have not, at any point, relied upon them.

The Witnesses from Mexico.

Whilst these attempts to obtain relief at Washington were progressing and being repulsed, many witnesses for the claimant arrived from Mexico at San Francisco.

Manuel Conto was the first to arrive. He left Mexico in August, 1858, and was examined from October 18 to November 1, 1858, inclusive (pp. 995 to 1047).

Immediately thereupon, November 5, 1858, the Government Counsel (Mr. Rannolph), moved "the court to fix a time for the closing of proofs." But "it appearing that

the claimant herein is proceeding diligently * * motion * * is denied" (p. 1058).

Again, on December 4, 1858, the like motion was made and "*denied*" (p. 1059).

On May 14, 1859, the rest of the witnesses from Mexico arrived (p. 1245, Q. 175 to 182).

Their examinations commenced June 1, 1859 (p. 1214) and were closed October 27, 1859 (p. 2586). *Record from* pp. 1214 to 2530, *and from* pp. 2553 to 2590.

The direct examinations of the Mexican official witnesses, including Couto, were elicited by 408 questions, and occupy 112 pages. 2459 cross-interrogatories were addressed to them, and their cross-examinations occupy 443 pages.

Whilst these proofs were being put in as rapidly as interminable cross-examinations would permit, the impatience of the Government Counsel to close proofs exhibited itself *very often*. Two instances have been mentioned. In the midst of the work, October 3, 1859, a third motion was made and argued by Mr. Randolph "for an order closing proofs," but it was denied (pp. 2227, 2228).

Nature of the Mexican proofs.

The proceedings in the City of Mexico in April and May, 1846, on Castillero's announcement of his discovery, and his consequent application for encouragement, induced official action in five distinct public departments.

First. In the *Junta de Fomento y Administrativa de Mineria.* The general functions of this body are explained at the places in the record now referred to. It was reorganized in June 28, 1852, and was thenceforth known as the *Administracion del Fondo de Mine*

ria (*p.* 1008, Q. 29, *p.* 997, Q. 17, *p.* 1002 Q. 43.) We shall unvariably call it the MINING BOARD.

Testimony of Bassoco, pp. 1219, 1243. *Exhibit Bassoco, No.* 13, *p.* 1820 *to* 1827. *Testimony of Manuel Couto, p.* 1025.

Second. THE NATIONAL COLLEGE OF MINING. We call this simply the COLLEGE.

Third. The *Junta Facultativa.* This was a Board elected from their own body by the Professors in the National College of Mining (*p.* 1866, Q. 8).

It might properly be called the Faculty; but we shall designate it as the PROFESSIONAL BOARD.

Fourth. The Ministry of Justice. The *Espediente* which was formed in this department in 1846, on a subsequent re-organization of the departments, was transferred to the Ministry of Relations, where it was found in 1858 and 1859.

See testimony of Forsyth, p. 1112 *and pp.* 1138, 1139.

" *Exhibit Bassoco, No.* 8, *p.* 1614, 1804.

" *Also p.* 2193, Q. 328, 329—*p.* 2214, Q. 98 *to* 100, *and p.* 1037, Q. 235.

We shall, however, in referring to this Espediente, call it that of the MINISTRY OF JUSTICE.

Fifth. The Ministry called "*Ministerio de Relaciones Exteriores y Gobernacion*" (*p.* 2258, Q. 197, 198.) In 1846, this department comprehended not only foreign affairs, but most of the internal government. In this respect, it resembled our department of State, prior to 1849, when the "Department of the Interior" was established. 9th Vol. Statutes at large, p. 395, (*p.* 2258, Q. 196, *p.* 2234, Q. 30.)

The Mexican Department *de Estado y del despacho de Gobernacion* was formed subsequently to 1846.

This was, in fact, the Mexican Department of the Interior (*p.* 2240, Q. 63. *And top line of p.* 1618).

The *Espediente* touching this grant of land in California, which was formed in 1846 in the Ministry of Relations, was of course transferred to the new department. And it was there found in 1858 and 1859.

See pp. 1112, 1143, 1618.

We shall refer to the Ministry in which this business was conducted in 1846, as the MINISTRY OF RELATIONS.

Each of these public departments preserved in respect to its Acts on each distinct business an *espediente* or record in the form described on *p.* 41 *of this Brief.*

The mode of forming the espediente in those public national executive or administrative departments, is such as to render the *espediente* in each department a test of the accuracy of the *espediente* in any other department with which the former had any correspondence on the particular matter (p. 2192, Q. 326. p. 2238, Q. 58, 59, 60. p. 1277, Q. 386. p. 1028, Q. 170, 171. p. 2207, Q. 47).

The department making a report or communication placed in its *espediente* a copy or full minute of the document it had so issued. We will call this an *office copy.* Each department receiving a report or communication from any other placed that original in its own *espediente*, or transmitted it to some other department where, at last, such original found its resting place in an appropriate *espediente.*

It was usual to place on the margin of a communi cation to the Government a brief note of its contents. called a *membrete.*

It was also usual for the officer receiving a communication to place upon the margin a brief note or

memorandum of its receipt, or memorandum of the action had or taken upon it, or the conclusion arrived at concerning it. (p. 2113, Q. 23. p. 2235, Q. 38 to 40).

When the Minister presented to the government a matter requiring its determination, the proper minister made a similar marginal note of the President's decision upon the report or communication which invoked it. This marginal note was called an *acuerdo*. It was *in fact* the original decree of the Government; and it was delivered to a clerk of the department to be carried out in due *form*. (p. 2113, Q. 23. p. 2235, Q. 38 to 40. p. 2117, Q. 39 to 44. p. 2119, Q. 58. p. 2133, Q. 165. p. 2216, Q. 110. p. 2266, Q. 242. p. 1040, Q. 252).

An *acuerdo*, always, and the memorandum indicating a conclusion or act to be done, was usually authenticated by the *Rubric* of the Minister or proper officer of the department. (p. 2235, Q. 39).

A *rubric* is a flourish or arbitrary figure usually put after the name. (p. 1275, Q. 372). It is often used alone to authenticate an act or document. (p. 1221, Q. 73).

Traced copies of these several *espedientes* were first introduced in the District Court, on the testimony of Hon. John Forsyth, that he in July and August, 1858, being U. S. Minister to the Republic of Mexico, in company with Frederick Glennie, Esq., British Consul; John P. Brodie, of California; and Licentiate Emilio Pardo (the law agent of the claimant, p. 1009), compared the same with the originals in the several proper public offices and found them to be correct.

Testimony of Mr. Forsyth, pp. 1111 *to* 1113.
" " *Jno. P. Brodie, pp.* 1059 *to* 1068.
Originals, pp. 1114 *to* 1145.
Translations of same, pp. 1163 *to* 1195.

Manuel Couto was examined in 1858, (p. 995,) previously to the arrival of the other witnesses from

Mexico. When testifying to the Mexican Archives he referred to *these exhibits, i. e.* Mr. Forsyth's.

Prior to the journey of the other Mexican officials to California in 1859, a fresh set of traced copies were produced and verified by these same witnesses upon comparison with the originals, in like manner as in the former case.

See second copies of several *espedientes* as follows:

Exhibit Bassoco, No. 7, *pp.* 1594 *to* 1605; *trans. pp.* 1783 *to* 1794.

Exhibit Bassoco, No. 8. *pp.* 1605 *to* 1614; *trans. pp.* 1794 *to* 1804.

Exhibit Bassoco, No. 9, *pp.* 1615 *to* 1619; *trans. pp.* 1805 *to* 1809.

Exhibit Bassoco, No. 10, *pp.* 1620 *to* 1623; *trans. pp.* 1809 *to* 1812.

Exhibit Bassoco, No. 11, *pp.* 1624 *to* 1626; *trans. pp.* 1813 *to* 1815.

The witnesses testified to a comparison of these traced copies with the originals in the several proper public offices in the spring of 1859.

See their memoranda of such comparison (pp. 1604, 1614, 1619, 1622, 1626).

Testimony of Castillo Lanzas, pp. 2230 *to* 2235.
" " *Blas Balcarcel, p.* 1870.
" " *J. M. Yrisarri, pp.* 2108 *to* 2110.
" " *Jose M. De Bassoco, pp.* 1237 *to* 1241.
" " *Mariano Miranda, pp.* 2147 *to* 2153.
" " *A. J. De Velasco, p.* 2201.

Copies made by tracing are so perfect that they include every blot or other accidental mark (p. 1035, Q. 211). The handwriting of the original can be identified by this means (p, 2193, Q. 330—p. 2114, Q. 31).

Both of these sets of copies were authenticated by certificates of the proper officers having custody of

the originals, at or about the times of the several comparisons. Such official certificates being countersigned by the Minister Resident or Consul of the United States for the time being. These certificates will be found at the end of each exhibit.

The claimant's aim was to give direct proof by the official persons who had been engaged in the acts in question; and so far as he failed to produce those official persons before the Court in California as witnesses, he tendered evidence of the fact that he was unable to do so. Some were dead; some were too aged and infirm to travel; some, for other causes, would not perform the journey. As to many of the latter, he obtained and placed before the Court their depositions, taken in Mexico. These, as before stated, were *ex parte*, it is true, but that was because the law officers of the Government positively refused to attend or participate in the examination. (*See this Brief, Ante*, p. 141 to 143; *see these depositions so taken in Mexico, with translations thereof*):

Exhibit Castillero, No. 14, pp. 3070 to 3124.

Alphabetical List of Mexican Officials.

Those official persons who were actually produced in California are in small capitals; those who made depositions in Mexico are in italics; those who were dead or for other cause not examined, are in roman.

BALCARCEL (Blas).

1. Examined June 28, 1859. Testimony, pp. 1865 to 1934. Became Professor of Geography, &c., in College of Mining early in 1844, and was a professor thereof until his examination. Was director two years of that time (p. 1865, Q. 4, p. 1878, Q. 86). In 1846 he was one of the Professional Board (p. 1866, Q. 7).

Balderas (Antonio).

2. Professor of French in Mining College in 1846 (p. 1003, Q. 51).

Bassoco (José Maria de).

3. Examined June 1, 1859. Testimony, pp. 1214 to 1329. Member of the Junta de F. or Mining Board for six years from December, 1842 (p. 1215, Q. 9).

Becerra (José M. L.).

4. Minister of Justice from January 7 to June 18, 1846. Was then Bishop elect of Chiapas, and afterwards Bishop of Puebla, where he died December 17, 1854 (p. 2108, Q. 5 to 8; p. 997, Q. 15; p. 2116, Q. 37; p. 2138, Q. 186, 187; p. 2147, Q. 4 to 9; p. 2156, Q. 31 to 33; p. 2230, Q. 11 to 15.)

Castera (José M.).

5. Secretary of the Junta de F. in 1846 (p. 996, Q. 12). Died about 1850 (p. 1003, Q. 47; p. 1217, Q. 35).

Castillo (Antonio del).

6. Examined July 15, 1859. Testimony, pp. 1935 to 1994. First a student in the College of Mining in 1836. Held various offices in or connected with the College, and was Professor of Geology and Mineralogy at the time of his examination (p. 1935, Q. 4). In 1846 he was a substitute Professor and was a Member of the Professional Board and Secretary thereof (p. 1936, Q. 6).

Castillo y Lanzas (Joaquin M. de).

7. Examined Sept. 2, 1859. Testimony, p. 2229 to 2373. Educated mostly in England—partly in Spain. Was thirty years in public life. At first chief clerk of an important bureau in the Ministry of War, afterwards Private Secretary to General Santa Anna and President Pedraza, Prefect of Vera Cruz, Chargé d'Affaires to U. S. Plenipotentiary to England, twice (Prime) Minister of Foreign Affairs, once Minister of Finance, twice Member of Congress, twice Councillor of State, and finally Intendant of the Navy, besides other commissions (p. 2229, Q. 4). Spoke English (p. 2241, Q. 66). He was a gentleman of learning, intelligence, and excellent capacity for business; but, it must be admitted, remarkably unobservant of persons, things, and events which did not specially interest him. He was a person of great modesty, and led a domestic life, mingling very little in society; yet he was from time to time selected for high public trusts by the appointing power, without any solicitation or agency of his own. His great merit was known

and appreciated though it sought concealment. (Q. 149, 227, 282, 284, 381, 386 to 389, 409 to 411, 439, 485 to 488, 529, 533 to 560, 570 to 603, 608 to 613.)

Mr. Randolph seemed really to doubt his identity, and resorted to tests which gave ludicrous results.

Testimony of Castillo Lanzas (pp. 2337, Q. 612; p. 2345).

Testimony of L. Ponton de Arce, p. 2220.

Testimony of Samuel Head, p. 2222.

The identity of this gentleman was further shown by the merchant, Mr. Negreté (pp. 2413, 2414), and also by all the official witnesses from Mexico.

Cauchola (José M.).

8. A Clerk of the Junta de F. in 1846 (p. 996, Q. 12). Became ill in April, 1847 (pp. 3326, 3328). Died in 1848 (p. 1012, Q. 59).

Couto (Manuel).

9. Examined October 18, 1858. Testimony, pp. 995 to 1047. Now Secretary of the Mining Administration (the official successors of the *Junta de Fomento*). Became an *escribienté*, writer or clerk in the Mining Board in 1844; so continued until 1848; then appointed an *official;* so continued until 1852; then appointed Secretary, and so continued hitherto (p. 996, Q. 2, 3, 12).

Duran (José M.).

10. Chief official in the Ministry of Justice in 1846 (p. 2116, Q. 37; p. 2117, Q. 44). Old and sickly (p. 2118, Q. 47). Examined in Mexico in 1859 (original p. 3087, translation p. 3115).

Flores (Juan M.).

Member of the Mining Board in 1846 (p. 1216, Q. 21, 23). Examined in Mexico in 1859 (original p. 3094, translation p. 3123).

Gondra (Ysidro R.).

12. Chief Clerk of the Junta de F. in 1846 (p. 996, Q. 12). Aged, sickly, and "in a dying condition" (p. 1003, Q. 45).

Groso (Gregorio).

13. Was an escribienté in the Ministry of Justice (p. 2115).

Herrera (J. J.).
14. President of Mexico in 1845 (p. 1911, Q. 228, 229). Is dead (p. 1003, Q. 53 ; p. 2290, Q. 366 to 375).

Herrera (Manuel).
Professor in College of Mining in 1846, died about 1856 (p. 1003, Q. 50, 51 ; p. 1875, Q. 61).

La Fragua (José M.).
Examined before Land Commissioner, Jan. 29, 1855. Testimony (pp. 15 to 22). A lawyer ; was a Senator and often a deputy in the Mexican Congress. Was Minister of Relations in latter part of 1846 (p. 16, Q. 2 ; p. 1270, Q. 347). Minister of Mexico in Spain in 1858 (p. 1005).

Lanzas, see Castillo y Lanzas.

Miranda (Mariano).
Examined August 11, 1859. Testimony, pp. 2146 to 2194. Entered the Ministry of Justice on probation in January, 1846 ; was appointed *escribiente* or writer in 1847, and so continued until 1852 (p. 2147, Q. 2 ; p. 2156, Q. 33). He then became confidential clerk of a mercantile house, and so continued at his examination (p. 2174, Q. 188 to 208).

Monasterio (José M. O.).
Was chief official in the Ministry of Relations in 1846 (p. 2112, 2202).

Moral (Tomas R. del).
Professor of Drawing in College of Mining in Dec. 1845 ; died in 1847 (p. 1231, Q. 107, 108 ; p. 1868, Q. 22 ; p. 1992, Q. 295, 296, 297) ; died in 1847 (p. 1944, Q. 45).

Motte (José del).
Member of *Junta de F.* in 1846 (p. 996, Q. 10) ; died in 1850 or 1851 (p. 1011, Q. 52).

Navarro (Costulo del)
One of the Faculty in 1846 (p. 1866, Q. 6, 13).

Osio, see *Rodriguez.*

Palacios (Juan).
Professor of English Language in Mining College in 1846 (p. 1003, Q. 51).

Paredes y Arrillaga (Mariano).
President of the Mexican Republic from January to July, 1846 (p. 18, Q. 9 ; p. 2156, Q. 33, 34).

Quintanar (Manuel).

(P. 2112, 2201). Third or fourth official in Ministry of Relations in 1846 (p. 2202); died about 1857 (p. 2232, Q. 23; p. 2201, Q. 9).

Rio (Andres del).

Professor of Mineralogy in College of Mining in 1846 (p. 1003, Q. 51).

Rodriguez (Mariano).

May be sometimes called "Osio" (*see* his signature, p. 3105); was fourth official in the Ministry of Justice in 1846; was alive in 1859, when Yrissari was examined, but very sick (p. 2110, Q. 14, 15, 17, 18, 19); examined in Mexico in 1859; original, p. 3077, translation, p. 3104.

Roman (——).

One of the writers to the Junta de Fomento (pp. 1245, 1217).

Romanos (Joaquin).

Was second official in the Ministry of Justice in 1846, and died in 1847 (p. 2110, Q. 14, 15, 16).

Ruiz (Agustin).

Was an *escribiente* or writer in the Ministry of Justice in 1846; he died May 3, 1848 (p. 2109, Q. 11, 12).

Saavedra (——).

An assistant *escribiente* or writer in the Junta de F. in 1846 (p. 996, Q. 12; pp. 1245, 1217.)

Segura (Vicente).

President of the *Junta de F.* in 1846 (p. 996, Q. 10); continued in that office to the present time, *i. e.*, Aug. 1858 (p. 1002, Q. 43); examined in Mexico (original, pp. 3078 to 3085; translation, pp. 3106 to 3112).

Sotomayor (Teodoro).

Was an escribiente in the Ministry of Justice in 1846 (p. 2109); examined in Mexico (original, p. 3075; translation, p. 3102).

Tejada (Manuel R. de).

Professor of Physics in the College in 1846 (p. 1003, Q. 51).

Tornel (José M.).

Director of College of Mining in April and May, 1846 (p. 1867, Q. 11; p. 1876, Q. 73; p. 1888, Q. 123 to 125; p. 1936, Q. 6); died Sept. 1853 (p. 1872, Q. 43).

Tornel (Jr.).

Was an escribiente in the College in 1846 (p. 1944, Q. 40).

VELASCO (Agustin J. de).

Examined Aug. 29, 1859; testimony, pp. 2199 to 2219; entered the civil service of Mexico in 1842, and so continued in various departments until his examination; was then an employée in the Ministry of Relations; in 1846 was fourth *escribiente* or writer in the Ministry of Relations (p. 2200, Q. 3).

YRISARRI (José M.).

Examined July 30, 1859; testimony, pp. 2107 to 2144; entered the Mexican Ministry of Justice as a clerk or writer on probation in 1834, and remained therein until his examination; through regular gradations reached the post of fifth official (p. 2107).

ABSTRACT OF MEXICAN PROOFS.

The *Espediente*, or record of its proceedings, in the MINING BOARD, is

In the original annexed to Minister Forsyth's dep. pp. 1114 *to* 1122.

In the translations of this Exh. pp. 1163 *to* 1176.

In the original Exh. Bassoco, No. 7, *pp.* 1594 *to* 1604.

In the translation of this Exh., pp. 1783 *to* 1794.

It contains as follows:

1. A *caratula* or superscription (written by Gondra, p. 997, Q. 20).

2. An office copy of this Board's order to Director Tornel, dated April 21, 1846 (written by Gondra, p. 997, Q. 20), directing assays of Castillero's specimens presented to this Board by Don T. Del Moral.

3. Copy of ex-President J. J. Herrera's letter of April 13, 1846, setting forth Castillero's announcement to him, touching his quicksilver mine, under date of Feb. 19 and 22, 1846; and a copy of a letter to same effect, from Castillero to Director Moral, dated Feb. 19, 1846, "presented by Don Tomas Ramon del Moral, when he presented to the *Junta* specimens of the ore of Cinnabar" (p. 997, Q. 20).
(These two copies were written by Roman, and bore the countersign of the *Junta's* office, p. 1238.)

4. Director Tornel's original report of the said assay to this Board, dated April 29, 1846 (signed by Tornel, p. 998, Q. 20).
On this is a marginal note that it was received May 3 (written and signed by President Segura, p. 998, Q. 20) Also a second note thus: "May 4, 1846. Let it be transmitted to the Government, manifesting that the communication was received yesterday" (written by Gondra, p. 998, Q. 20).

5. An office copy of this Board's report in the premises, *inter al.* to the Ministry of Justice, dated May 5, 1846 (written by Gondra, p. 998, Q. 20), stating that this Board "has already asked Señor Castillero what kind of aid or protection he needs for the encouragement of his brilliant enterprise," &c.

6. Original letter to this Board from Becerra, Minister of Justice, dated May 9, 1846 (written by Agustin Ruiz, p. 2148, and signed by Becerra, p. 998, Q. 20—p. 2148—p. 1238—p. 1943, 2109, 2231), in reply to this Board's report of 5th inst., and stating that His Excellency, the President *ad. int.* of the Republic, learns with satisfaction, &c., of Castillero's discovery.

7. Office copy (principally written by Saavedra, but interlined by Gondra, p. 998, Q. 20) of this Board's report to the Minister of Justice, dated May 14, 1846, and of Castillero's proposals, dated May 12, 1846, accompanying same (written by Roman, certified by Gondra, p. 1238). The Board recommend the latter. On the report is a *membrete* stating briefly its contents (written by Gondra, p. 998, Q. 20).

8. Original reply of Becerra, Minister of Justice, to this Board, in approval, dated May 20, 1846 (written by Sotomayor, p. 2148, and signed by Becerra, p. 998, Q. 20—pp. 1238, 2149, 1943, 2109).

Further explicit proofs of this Espediente.

Mr. Bassoco, a member of the Board in 1846, was produced and examined in California, in 1859 (pp. 1214 to 1329).

Manuel Couto, who was a writer for the Board in 1846, and was its regular secretary at the time of his examination, was, in like manner, produced and examined in 1858 (pp. 995 to 1047).

Both of these witnesses explicitly verified the transactions recorded.

Actas or Minutes of the Junta.

During the cross-examination of Couto, Secretary of the Mining Board, in 1858, the counsel for the Government suggested as an objection, that the Minutes of the *Junta* were not produced (p. 1031, Q. 188, 189, 190). The claimant's counsel determined to satisfy the Government's counsel.

The *Espediente* of the Mining Board was thereupon further confirmed by the production of a traced copy

of *all* the *Actas*, or minutes of that Board, from April 2, 1846, to June 30, 1847 (p. 1231.)

And these were verified in the fullest manner by the testimony of *Jose Maria de Bassoco*, who, during all the time covered by these minutes, was a member of the Board.

See Exhibit Bassoco No. 6, *O. H. pp.* 1427 *to* 1594.

Translations thereof, pp. 3171 *to* 3355.

Testimony of Bassoco, p. 1219, *Q.* 51, to *p.* 1226, Q. 95, *p.* 1234, *Q.* 128 *to p.* 1336 *Q.* 137.

In the minutes of April 23, 1846 (p. 3186), was this entry:

"The Professor of the College, Don T. Ramon del Moral, having sent in some specimens of cinnabar from the presidio of Santa Clara, in Californias, it was resolved that they be transmitted to the Director with copies of the letters of Señor Castillero who sends them, that the proper assays may be made."

In the minutes of May 4, 1846 (p. 3192), was this entry:

Seventh.—"From the Señor Director of the College, inserting the report of the Junta Facultativa of the same, in relation to the result of the assay made by him of the samples of cinnabar forwarded by Don Andres Castillero, of Californias. Resolved, that it be inserted to the Supreme Government, representing that this reply had not been received until yesterday, and that Señor Castillero had been answered that he should set forth the kind of protection, or aid, he needed for the favorable result of his enterprise; and lastly, referring him to the premiums which had been paid for the national quicksilver extracted in Guadalcazar.

In the minutes of May 6, 1846 (p. 3193), was the following entry:

"The Señor Don Andres Castillero presented himself, and made a verbal report, in relation to the discovery,

denouncement, and actual condition of the quicksilver mine in the mineral district of Santa Clara, of Alta California, inviting the Junta to take shares in the Company which he had established for the working of the same, with other measures which he asked from the Supreme Government, for the encouragement of the enterprise. The Junta resolved that Señor Castillero should present his statements in writing, in order that the Junta might take the same under consideration, and determine what might be convenient."

In the minutes of May 14, 1846 (p. 3197), was the following entry:

"First, from the Ministry of Justice, of date 9th, acknowledging receipt of the official letter in which was communicated to it the discovery of the mine of quicksilver in Californias."

In the minutes of May 18, 1846 (p. 3199), was the following entry:

"In the third, he informs, that of the one thousand two hundred and seventy quicksilver flasks existing in the negotiation, there are only a very few having flaws, and that they ought to be worth three dollars each, per piece, as they are valued at two, reckoned as iron. Let this difference be represented to Señor Castillero."

In the minutes of May 25, 1846 (p. 3203), was the following entry:

"*Sixth*. An official letter from his Excellency, the Minis- of Justice, dated 20th, approving the propositions of Don Andres Castillero, which the Junta had transmitted to the Supreme Government, and informing that he had sent to the Ministry Government the Petition for two square leagues of (Sitio de ganado mayor) as a colonist, upon his mining property. The Junta resolved, that the proper judicial agreement be drawn up immediately, and that application be made for the draft for the five thousand dollars, on Mazatlan or Guadalajara, to which Señor Castillero agreed; and, finally, that by the mail of Wednesday, the proper orders be sent to Tasco, that the administrator deliver to the order of Señor Don Tomas Ramon Del Moral, all the quicksilver flasks in good condition in the storehouses there, at the rate of two dollars each."

In the minutes of May 29, 1846 (p. 3206), was the following entry:

"It was also resolved, in conformity with the report of the Controller's Office, that twenty-five dollars be paid to the Notary, Calapiz, for proceedings in the instrument of agreement which had been made with Don Andres Castillero, to assist his quicksilver enterprise in the mine of Santa Clara, in Upper California, embraced in the official order for the suspension of all payments for this branch."

The *espediente* or record of its proceedings in the COLLEGE is

In Spanish, Forsyth's, pp. 1125 *to* 1127.
Translation " *pp.* 1175 *to* 1179.
Spanish Exh. Bassoco No. 10, *pp.* 1620 *to* 1624.
Translation " " *pp.* 1809 to 1812.

It contains:

1. An original letter from the Mining Board to Director Tornel, dated April 21, 1846, desiring an assay of Castillero's specimens (written by Couto, and signed by President Segura and Clerk Gondra, p. 1240, Q. 152; pp. 998, 999, Q. 21, 22).

   On this is a marginal note (written and signed by Director Tornel, p. 1240, Q. 152) in these words: "April 23, 1846. Let it go to the Professional Board of the College with preference. Tornel."

2. A copy of J. J. Herrera's latter of April 13, 1846 (written by writer Roman, and certified by chief clerk Gondra, April 21, 1860, p. 1240, Q. 152).

3. A copy of Castillero's letter of Feb. 19, 1846, to Director Tomas R. del Moral (written by writer Roman, and certified April 21, 1846, by chief clerk Gondra, p. 1240, Q. 152).

The *espediente* or record of its proceedings in the PROFESSIONAL BOARD is

In Spanish, Forsyth's, pp. 1125 *to* 1129.
Translation thereof, pp. 1175 *to* 1179.
Exh. Bassoco, No. 11, *pp.* 1624 *to* 1627.
Translation, pp. 1813 *to* 1815.

It consists of

1. Original minutes of a meeting of this Board, held April 24, 1846 (mistakenly dated March 24, 1846) (p. 1941, Q. 35).

   These minutes were drafted by Professor Del Castillo, Secretary of the Board (p. 1943, Q. 39); engrossed by Tornel, jr. (p. 1944, Q. 40); and signed by Don Tomas R. Del Moral, President of this Board (p. 1941). Del Castillo, the official Secretary, did not sign at the time. Reasons why (p. 1939, Q. 29 to 33, 280 to 288).

2. Original report to this Board by Director Tornel, dated April 29, 1846 (signed by Tornel, p. 1941), stating that he (Tornel) had communicated to the Mining Board (Del Moral's) official communication of the assay.

Further proof as to the espedientes of the College and of its Professional Board:

Professor Del Castillo (p. 1935), Professor of Mineralogy and Secretary of the Professional Board, testified as follows: Was at the meeting of April 24, 1846 (p. 1940, Q. 33, 39); in November, 1846, delivered a lecture to his class, important parts of which were published in the College Annual of 1848; it mentions Castillero's discovery (p. 1945, Q. 53 to 59; p. 2106).

See Exhibit Castillo No. 2; *original, pp.* 2047 *to* 2051; *translation, pp.* 2102 *to* 2106.

Castillero's discovery "was generally known" in Mexico, and "miners especially were informed of it" (p. 1944, Q. 48, 49).

Professor Castillo had charge of a cabinet, and placed therein specimens of cinnabar, &c., presented to the class by Del Moral about April, 1846, as having been received from Castillero (p. 1937, Q. 11, 13, 16). Inscriptions were then put upon them (Q. 19), and renewed in 1850 (Q. 21).

See also the

Testimony of Professor Balcarcel, pp. 1865 *to* 1934, especially p. 1911.

The *Espediente* or record of its proceedings in the MINISTRY OF JUSTICE is

In Forsyth's original, at pp. 1130 *to* 1142.
Translation thereof, at pp. 1179 *to* 1193.
Exh. Bassoco No. 8, *at pp.* 1605 *to* 1614.
Translation thereof, at pp. 1794 *to* 1804.

It consists of

1. *A caratula* or superscription (written by Rodriguez, p. 2110, Q. 14).

2. Original letter of May 5, 1846, from the Mining Board to this Ministry, announcing Castillero's discovery, the assay, &c. (written by Couto, p. 999, Q. 24, and signed by President Segura and Clerk Gondra, p. 2110, Q. 14).

   On this is a *membreté* stating its contents (written by Couto, p. 999, Q. 24).

   And a second memorandum thus, "May 9, 1846, noted with satisfaction the discovery," &c., &c. (written by Duran, p. 2117, Q. 44).

3. Copy of J. J. Herrera's letter of April 13, 1846, announcing Castillero's letters of 19 and 22 Feb., 1846, and copy of Castillero's letter to Moral, dated Feb. 19, 1846 (certified by Gondra, May 5, 1846, p. p. 2110, Q. 14).

4. Office copy of the reply by this Ministry to the Mining Board, dated May 9, 1846, acknowledging its letter of May 5, 1846 (written by Rodriguez, p. 2110, Q. 14).

5. Original full Report of the Mining Board to this Ministry, dated May 14, 1846 (written by Saavedra, p. 999, Q. 24, and signed by President Segura, p. 2110, Q. 14), to which is annexed the original application of Castillero, dated May 12, 1846 (written by Couto, at the Junta's office, by direction of his superiors, on the day of its date, and then and there signed by Castillero, p. 1000, Q. 25 to 28—p. 1002, Q. 41—p. 1032, Q. 191 to 206—p. 1038, Q. 242).

On this Report is a membrete of its contents (written by Saavedra, p. 996, Q. 24).

And an *acuerdo* (written by Romanos, p. 2110, Q. 14, and signed with the Rubric of Becerra, p. 1000, Q. 24, 29; p. 2110, Q. 14; p. 1239, 2151), in these words: "May 20, 1846, Granted in the terms which are proposed; and, with respect to the land, let the corresponding order issue to the Minister of Relations for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition."

6. Office copy of this Ministry's despatch to the Mining Board, dated May 20, 1846, signifying that "His Excellency (the President) has been pleased to approve in all its parts the agreement made with" Castillero, and that the corresponding communication as to Castillero's 8th proposition for a grant of lands, had been made (written by Rodriguez, p. 2111).

7. Similar office copy of this Ministry's communication to the Minister of Relations that the orders issue corresponding with the President's grant of two square leagues of land to Castillero (written by Rodriguez, p. 2111, Q. 14).

The proceedings in the Ministry of Justice were further confirmed by contemporaneous entries in a book of record, kept in said Ministry during the year 1846, of which a traced copy was produced and verified in the same manner as the other traced copies from the archives (p. 2114).

Exhibit Bassoco, No. 12, pp. 1816, 1817.

On the original report of the Mining Board, dated May 14, 1846, to this Ministry, (of Justice,) there was a note in addition to those before specified. It was as follows:

"*L. gl.* 15 *sf*, 140 *Vta.*" This signified in Spanish, "*Libro general tomo quince fojas* 140 *Vuelta*," which rendered into English signifies, "Fifteenth Volume of the general book reverse leaf 140." This entry was identified by *Yrissarri* as his own (p. 2114).

The book contained on the leaf thus indicated a copy of Minister Becerra's *Acuerdo* of May 20, 1846. "It is granted, &c." The same leaf contained an entry of permission to this same official, *Yrissarri*, to marry, dated May 18, (p. 2132.) All these entries were distinctly verified by the witness *Yrissarri* as his own handwriting, and as being true in point of fact. Other entries on the same page, were identified as the writing of *Castro* and *Groso*, officials in the department.

Testimony of Yrissarri, pp. 2113 to 2116; 2123 to 2136.

On the margin of the said original and first communication of the Mining Board to the Ministry of Justice there was found, as before stated, an entry in the handwriting of José Maria Duran, then official Mayor, or first official in this Ministry, (of Justice,) beginning with the words, "May 9, 1846." In the original Spanish at p. 1605, the letters "*fho*" appear. This also was in the handwriting of the same Duran. It is an abbreviation

of the Spanish word "*fecho*," meaning that the *acuerdo* on this matter had been complied with.

Testimony of Yrissarri, pp. 2117 to 2119.

As to the proceedings in this Ministry, (of Justice,) see further the

Testimony of Mo. Miranda, pp. 2146 to 2194.

The Espediente or record of its proceedings in the MINISTRY OF RELATIONS is

In Forsyth's original at pp. 1140 to 1143.
Translation thereof at pp. 1190 to 1194.
Exh. Bassoco No. 9, *at* pp. 1615 to 1618.
Translation thereof at pp. 1805 to 1809.

It consists of

1. The usual *Caratula* or superscription (written by Quintanar, p. 2201, Q. 9).

2. An original communication of Pio Pico, Gov. of California, to this Ministry, dated, Feb. 13, 1846, announcing Castillero's "fortunate discovery * * of a quicksilver mine * * in this department," that Gov. Pico avails himself of the "opportunity to send * * by the Commissioner of the Government, D. José M. Covarrubias ** a sample ** sent" the Governor "by Senor Castillero," The Governor refers to Castillero's *original* letter to him, Pio Pico, on the subject, dated Dec. 10, 1845, praying "that the vacant lands near to our works be conceded to us, to cut wood, &c." The Governor requests that it be "put ** in the superior knowledge of the President, showing him the quicksilver which said mine produces."

On this is a marginal note thus: "April 6, 1846, received and noted with satisfaction, and with respect to the other matters contained in the letter let him inform attentively what he may see fit."

(This was written by Monasterio and bore the rubric of Castillo Lanzas, p. 2202.).

3. The said original letter of Castillero to Gov. Pio Pico, dated December 10, 1845.

4. Office copy of a letter from this Ministry to the Governor of California, dated April 6, 1846, announcing that the President *ad interim* had seen Castillero's letter and the sample, and conforming to last mentioned marginal note (written by Quintanar, p. 2202.)

5. Original communication from Becerra, Minister of Justice, to this Ministry, dated May 20, 1846, reciting its communications of that date to the Mining Board on Castillero's application, petition or proposals, "to the end that with respect to the petition of Señor Castillero, to which his Excellency the President *ad interim* has thought proper to accede, that there be granted to him, as a colonist, two square leagues upon the land of his mining possession: your Excellency will be pleased to issue the orders" corresponding. (Written by Miranda, p. 2112, 2153, and signed by Becerra, p. 1240 Q. 148—p. 2112. p. 2153—p. 2232.

On this is a marginal note as follows: "May 23, 1846. Issue the orders referred to in this communication" (written by Castillo Lanzas and bearing his rubric, p. 2202).

6. Office copy and minute of despatch from this Ministry to the Governor of the Californias, dated May 23, 1846, transcribing this communication so received from the Ministry of Justice, "in order that in conformity with what is prescribed by the laws and dispositions upon colonization, you (the Governor) may put Señor Castillero in possession of the two sitios mentioned" (written by Quintanar, p. 2202—p. 2208, Q. 50, 51).

Further proofs of this Espediente.

Agustin Olvera, now, Nov. 30, 1859, Receiver of Public Money for Los Angeles District, testified thus (*pp.* 2609, 2610): He, Olvera, was Secretary of the Departmental Assembly, at the date of Governor Pico's letter of Feb. 13, 1846, to the Ministry of Relations. He, Olvera, wrote the rough draft thereof produced at

this date from the office of the U. S. Surveyor General for California (p. 3068).

See this draft or borrador, p. 2545.

A traced copy taken from the espediente in Mexico being exhibited to Mr. Olvera, he testified that the original was in his "own handwriting" and "the signature to it is Pio Pico's;" and he answered, "I must have written it at the time I wrote the borrador or rough draft. I have an idea that I saw some specimens of the ore, but my recollection of it is not clear."

The traced copy is Exhibit Bassoco, No. 9. *O. H. p.* 1805.

This witness was a public officer of the United States; and had previously held many high public trusts. Mr. Randolph, the private counsel of the Fossat Claimants and the special counsel for the Government, was present at his examination, and did not cross-examine him.

Unless Olvera committed perjury, it would seem impossible to doubt the narrative of Castillero's applications to the Supreme Government and their result.

Governor Pio Pico was examined October 19, 1859 (pp. 2531 to 2552). He verified the same borrador spoken of by Olvera, and the said traced copy of his original letter to the Ministry of Relations. He testified that Castillero announced the discovery to him, sent him "a sample of the quicksilver from the mine in a small bottle," and that he sent one of Castillero's communications and the sample to the Government in February, 1846, by the hands of José M. Covarrubias (Q. 7, 8, 14 to 16, 28 to 37, 72 to 74).

José M. Covarrubias was examined November 23, 1859 (pp. 2606 to 2608). He testified directly to his voyage to Mexico, commencing February 14, 1846, that he bore the said dispatch from Governor Pico, and also the bottle

of quicksilver received from Castillero. That he delivered both to Mr. Castillo Lanzas, Minister of Relations, remained in the Capital about twenty days in March and April, 1846; formed an acquaintance with the Minister, boarded with him and his sons, and that they were "in the habit of talking over the discovery of this mine among other matters relating to California."

Other Public Documents proving the transactions of the Mexican Government in May, 1846, in relation to Castillero's discovery.

Lafragua, then Minister of Relations, read before the Mexican Congress, on the 14th, 15th and 16th days of December, 1846, the Report of that Ministry.

This report contained a full account of Castillero's discovery, and of the action had in reference thereto by the Mining Board and the Government at the city of Mexico in May, 1846.

It was printed by the Government, and copies of it were distributed.

So much of Minister Lafragua's report, as related to the supply of quicksilver, was founded upon a Report of the Mining Board, subscribed by its president, *Segura*, and its clerk, *Gondra*, dated November 17th, 1846.

Report of the Mining Board to the Minister, pp. 1712 to 1754.

And especially pp. 1737 to 1739.

Reading thereof noted in Actas or minutes, pp. 1702, 1704.

Note of Minister's reply, Actas, p. 1705.

Report of Lafragua, Exh. Bassoco, No. 3, p. 1709 to 1711.

Testimony of Bassoco, pp. 1231 to 1234, 1251 to 1274.

Testimony of Lafragua, pp. 17, 18, 70, 71.

Testimony of J. P. Benjamin, pp. 3026 to 3041.

The claimant's counsel produced numbers of three different newspapers, printed at the city of Mexico, on the 18th, 20th, 21st, 24th, 25th and 28th days of December, 1846, setting forth the commencement, the continuance, and the conclusion of this public reading of Lafragua's report (pp. 2357, 2358).

Oral testimony as to Castillero's presence and action in the City of Mexico in May, 1846; and that the transactions recited in the espedientes actually occurred.

Manuel Couto, pp. 1001, *Q.* 36 *to* 39.
Jose Maria De Bassoco, p. 1225, *Q.* 92 *to* 107; *p.* 1244; *pp.* 1283, 1312, 1314 *to* 1316, 1322, 1323, 1325.
Professor Del Castillo, p. 1944, *Q.* 48; *p.* 1937, *Q.* 11; *p.* 1900, *Q.* 173; *p.* 1911.
Professor Balcarcel, p. 1868.

Conclusion.

Agustin Jimenes de Velasco, examined in California, Aug. 29, 1859, testified that he was fourth *escribiente* in the Ministry of Relations, in 1846, and that he himself wrote the Castillo Lanzas despatch to the Governor of California, directing him to put "*Castillero in possession of the two leagues*," and that Castillo Lanzas signed it.

He also testified that the office copy preserved was in the handwriting of *Quintanar*, a fellow official in that ministry.

Testimony of Velasco, pp. 2200, 2201, 2206, 2208, 2217, 2218.

Castillo Lanzas, the Minister himself, examined Sept. 2, 1859, testified that he signed the despatch, and that he personally laid the sample before President

Paredes, and remembered transacting the business (*pp.* 2233 *to* 2235, 2345).

Mr. Velasco, the official, testified that the usual course, when such a despatch was completed, was to place it in a box kept in the ministry for the reception of letters to be mailed. But that sometimes they were sent by a special messenger, or delivered to the party in interest. He had no recollection what course was adopted in this instance (*pp.* 2206, 2207, 2212, *Q.* 89 *to* 96).

Francisco M. Negrete testified that in Dec. 1846, Andres Castillero handed him this document at the City of Mexico, and that he transmitted it by mail to Alexander Forbes, at Tepic (*p.* 2402, *Q.* 36; *p.* 2492).

FOURTH DIVISION.

This Division, as stated in *this Brief at page* 5, might be regarded as surplusage.

Certain attempts to contradict the claimant's witnesses, or to throw doubt upon some parts of his narrative by evidence or suggestion, are here stated in detail, and the evidence in answer to them is also stated.

An Attempted Contradiction.

From the summer of 1857, when suspicions were first set on foot concerning it, until the summer of 1860, when Castillero's duplicate Act of Possession was found in the hands of Walkinshaw's executor (p. 2685), the claimant's counsel were unable to divine (p. 2813) how the certificate of *Pedro Chabolla*, the Alcalde of 1846, with his two assisting witnesses, *Pedro Sainsevain* and *José Suñol*, found their way into the supposed copy of the Alcalde's *espediente*, which Al-

calde Weekes had certified at the request of J. A. Forbes in 1848. *See this Brief, p.* 69 to 90.

The moment the papers from which Weekes' copy was so made thus came to light, the original signatures of these men, Alcalde *Chabolla* and his assisting witnesses, *Sainsevain* and *José Suñol*, furnished a clue to further evidence in favor of the claimant and in opposition to the idea that Alcalde Pico's Act of Possession was recently fabricated.

We have seen that all the persons connected with these papers were now vouched, and that they testified to their verity.

See this Brief, ante, p. 86, 87.

Hereupon the Government or rather its allies, *pro hac vice*, the Fossat claimant's counsel, as counsel, and the Berreyesa claimant's counsel, as witnesses, made an attempt to impeach Sainsevain, one of these assisting witnesses, notwithstanding that he was a substantial and respectable citizen (p. 2829, Q. 70 to 72). This was attempted by means of the feeblest of all feeble testimony, a retail of a supposed oral declaration by him. *Malin* v. *Malin*, 1 *Wend.* 652.

Sainsevain, one of these witnesses, had been agent for some of the Berreyesa family (p. 2814), and, consequently, had had some oral correspondence with Marks, the agent (p. 2824), and Mr. Sloan, the counsel for those who insisted that the Berreyesa ranch included this mine (*see this Brief, pp.* 37, 38.

Sainsevain was cross-examined at great length to the point whether, at a previous time, in the presence of Marks and Sloan, he had stated that although he, Sainsevain, had in fact affixed his signature to this Chabolla certificate, dated Jan. 13, 1846, yet that "it was only done in 1848" p. 2814, Q. 29).

See Sansevain's whole cross-examination, p. 2811 to 2816.

He denied the suggested fact unequivocally (p. 2814, Q. 29, p. 2816, Q. 36). And he gave a response to it which is very lucid, when we consider that Alcalde Weekes' certification was dated in 1848, and that from the summer of 1857, when that copy was first scrutinized, until 1860, when its originals were found with Walkinshaw's executor (*ante*, p. 69 to 90), the thing had been a puzzle.

See p. 2813, Q. 26.

"*Q.*—Do you not distinctly remember that you were shown* *some time in* 1857,* * copies of the representations of Andres Castillero, &c., above referred to, and that your attention was at that time drawn to the fact that you appeared on the same to be an assisting witness?"

'*A.*—I remember distinctly. I stated that it was true I had signed as assisting witness some document relating to the denouncement of the Almaden Mine, but that I could not remember when I had done so, nor even what the document was, without seeing it" (p. 2815, Q. 34).

"I was asked to testify by Mr. Crittenden (counsel for the Castillero claimants), Mr. Laurencel (their Fossat ranch opponent), * * but they said the papers were lost. I answered them as I have stated."

He stated that he remembered that it was written between two specified events, adding:

"If it had been antedated, or did not bear the true date, I should have noticed it when I signed. * * Moreover, I thought of the matter since I have seen the paper, and I recollect that it happened about that time" (p. 2813, Q. 27, and p. 2815, Q. 34).

Messrs. Marks and Sloan were examined for the United States to fix upon Sainsevain the supposed contradictory statement.

See testimony of J. D. Marks, pp. 2821 to 2844.

See testimony of E. W. F. Sloan, p. 2845 *to* 2864.

Mr. Marks was, to say the least of it, a very willing witness. Mr. Sloan, on the contrary, was a very fair and careful one.

Their testimony taken together, and considered as

a whole, fairly establishes that *before the original* Chabolla certificate of Jan. 13, 1846, was found with Walkinshaw's executor. Sainsevain was talked to by Marks, in the presence of Sloan, in relation to the Weekes' copy, and some allusion was made to its date as being in 1848—a period altogether too late for the purposes of the Castillero claim. This allusion was no doubt made by Marks; and, perhaps, it was acquiesced in by Sainsevain. Hence the imaginary conflict between Sainsevain's former statement and his present testimony.

See Marks to questions 22, 62, 77, 90 *to* 104.
See Sloan to questions 8, 9, 10, 12, 29, 30, 32, 33, 38, 41, 43, 45.

Another Attempt to Impeach the Claimant's Evidence.

Among his exceptions to the technical sufficiency of the Castillo Lanzas despatch, as a grant, J. A. Forbes in his letters to A. Forbes, found fault that the despatch was not addressed to the grantee, *i. e.* to Castillero himself, but only to the Governor of California (*p.* 843).

A. Forbes, under date of Tepic, Dec. 1, 1849, wrote to J. A. Forbes that he, A. Forbes, had deposited and registered at Monterey a document "directed to D. Andres Castillero," being a copy of the other which was addressed to the Governor, and suggested that perhaps this might obviate the objection (*p.* 396). In a letter, dated Feb. 3, 1850, A. Forbes again calls attention to this same supposed fact (*p.* 401).

On this, it was insinuated that, at some period, Castillero's grantees had a duplicate or copy of the Castillo

Lanzas despatch, which, through some indirection, or on second thought, had been suppressed:

When J. A. Forbes was under examination as a witness for the Government, and well disposed to aid in defeating this claim, he thus testified, on this point (*p.* 489).

Q.—Did you examine at Monterey for the purpose of obtaining that document?

A.—I did not.

Again on re-direct by the Government, p. 490.

Q.—Why did you not go to Monterey to look for the document spoken of by Mr. Alexander Forbes in his letter to you?

A.—I thought it would be useless.

Q.—Why?

A.—Because I didn't think it was there.

Q.—Why didn't you think it was there?

A.—I thought he might have been mistaken.

Thus, in the judgment of a very acute man, exceedingly conversant with everything about the mine and its paper title, seeing the *point*, and quite anxious about it, too, a solution of this difficulty is given. It was merely a blundering mis-recollection by A. Forbes in relation to something he had done or intended to do a long time previously, while he was in California.

Gen. H. W. Halleck testified that from Aug. 1847 to December, 1849 (which embraced the whole period of A. Forbes' visit to that country), he, Halleck, was Secretary of State for California (*p.* 360, *Q.* 165, 166). As such, he had "charge of the public archives of the Government in Monterey" (*p.* 363, *Q.* 184). He negatived the fact that A. Forbes had lodged "any document among the public archives" (*p.* 363, *Q.* 185 *to* 190).

An attempt to prove that the Alcalde's Act was not kept in the Alcalde's office.

The inventory showing the articles delivered by the outgoing Alcalde Picoto the incoming Alcalde Chabolla (see ante pp. 73, 74), was sought to be discredited by exhibiting, from the same Archives of San José, an inventory purporting to have been made November 10, 1846, which did not contain the Alcalde's *espediente* of this mine. But this paper bore no signature; and many papers were found with it among the Archives, bearing a prior date which were not mentioned in this November inventory. And these very papers were produced by the Government as genuine.

See Exhibit, No. 4, *Yates*, pp. 810 to 812.
Exhibits, 7, 8, 9, 10, pp. 816 to 819, *and see foot of* p. 771.

Besides, that list enumerates the articles not one by one but in bundles, as for instance:

"*Legajo de papeles sueltos de varios asuntos*," "or a package of stitched papers on various subjects" (p. 811).

"Again: another item is "*representaciones en legajo del ano* 45," or "a package of representations made in the year 1845."

Attempt to contradict General Castro.

The before mentioned petition of General Castro, dated June 27, 1846, which has upon it the said marginal decree of Alcalde Dolores Pacheco, dated June 29, 1846, allowing it to be archived (p. 257, 794, 622), was in the handwriting of *Benito Diaz* (p. 676, Q. 2). It was thus assailed:

Benito Diaz was produced as a witness for the Government, and testified that he, Diaz, wrote it several months after its date, at the request of Padre Real (p. 678, Q. 19

to 23, p. 688, Q. 47 to 58, p. 698, Q. 128 to 136, p. 712, Q. 2 to 9).

It will be seen that the fact here alleged was of no importance whatever, except as it would have shown a capacity on the part of José Castro and Padre Real to fabricate and antedate papers.

Answer to this.

First. The cross-examination of Diaz showed him to be, by his own confession, addicted to deception and prone to making false statements. And it showed sundry other facts tending strongly to impeach him (pp. 680 to 716, *especially questions* 43 to 46, 70, 71, 102 to 109, 199.

This man seems also to have been judicially known in the Court below as an unreliable person (p. 3477).

Secondly. Gen. José Castro contradicted him directly (p. 2114, 2614).

Thirdly. The thoroughly proven and identified copy of this paper, certified by the Alcalde Chabolla, Aug. 18, 1846, and the decree of Alcalde Dolores Pacheco, written upon the original, directing it to be archived, are both inconsistent with his statement. *See this Brief, pp. 74 to 76.*

Fourthly. We have seen that Castillero had a duplicate Act of Possession, dated, Dec. 30, 1845, which he took with him when he went to Mexico in April, 1846. This Castro petition refers to the possession as being given on 30th Dec., 1845. That date could not have been found except in Castillero's duplicate. This strongly confirms José Castro's narrative concerning the origin of his petition.

Another attempt to contradict the Claimant's Evidence.

J. J. Herrera was President of Mexico when Castillero was sent to California, in 1845. And he had ceased to be so in April, 1846 (p. 2288, Q. 361). *See also p.* 1911.

Don Tomas Ramon Del Moral was Director of the National College of Mining when Castillero left for California in 1845 (p. 3207, 1321). He too had ceased to hold that office in April, 1846. At the latter date he was a Professor and President of the Professional Board (p. 1813, 1814).

We have seen that Castillero on Feb. 19th and 22d, 1846, addressed each of these gentlemen, announcing his discovery. To the latter he says: "With this I send ** some ores of cinnabar and a little quicksilver. * * I would esteem it a favor if you would take the trouble, for the sake of the public good, to cause this metal to be assayed, as this operation depends upon your work" (pp. 1784, 1785, 1244, 1900, 1911).

Del Moral caused an assay to be made. He presented a portion of the specimens to the class of Mineralogy; and he presented another portion to the Mining Board together with copies of Castillero's announcements.

Espediente of Mining Board, pp. 1783 to 1785.
Testimony of Professor Del Castillo, p. 1937.

It was in this way that the official proceedings in the city of Mexico had their inception.

Castillero's letters to his friend, Gen. Vallejo, impliedly stated that these communications and specimens went by the hands of an officer named Lazaro Piña.

Feb. 21, 1846, Castillero writes of a "brigantine schooner" which "sails shortly and will carry communications of what has occurred lately. Myself or *Piña* will leave in it or both together" (p. 2605).

March 11, 1846, he wrote, "*Piña* embarked on the fourth of this month in Monterey, and was despatched in perfect order. He will travel post to Mexico" (p. 2605).

Gen. Vallejo thus testifies:

Q. 8. Who was the *Piña* mentioned in Castillero's letters; did you know him, and do you know what became of him?

A. He was lieutenant (alfarez) of the permanent Cavalry. He was for a long time my adjutant, and was a most excellent officer of Artillery.

I know that he left California in 1846, and never returned. I have heard and believe he was killed at the battle of Cerro Gordo. His name was *Lazaro Piña* (p. 2599).

The counsel for the Government offered evidence tending to establish that no vessel sailed from Monterey at or about the time indicated in this correspondence, *i. e.*, March, 1846, and sought to prove that *Piña* left Monterey at a later period.

That evidence is as follows :

Wm. P. Reynolds, mate of a ship, testified that he did not know of any vessel having left any port of Upper California for a Mexican port in January, February, or March, 1846 (p. 821, *Q.* 1 to 6). On cross-examination he said that he sailed from Monterey, 27th Jan., 1846, for Sta. Barbara, and was forced therefrom out to sea, and wrecked on Feb. 26, 1846. He remained on the wreck discharging cargo until March 24, 1846 (p. 827, *Q.* 3 to 5).

L. W. Sloat, who was secretary to Com. Sloat, testified that from Jan. 1st to June 1st, 1846, he "was on board the frigate Savannah, in the harbor of Mazatlan;" that arrivals at Mazatlan or San Blas from Upper California "were very few indeed" during that period; that he left Mazatlan in the Savannah June 8, 1846, and arrived at Monterey July 2, 1846. He thought he had not heard of Fremont's arrival in Upper California before the Savannah sailed from Mazatlan; he thought they first received information of the difficulties between Fremont and Gen. Castro after the Savannah arrived at Monterey, *i. e.*, July 2, 1846 (pp. 830 to 833).

John Paty, master of the brig Don Quixote, which sailed from Monterey for Acapulco on April 3, 1846,

with Castillero as a passenger, and with some specimens of ore, was produced as a witness for the Government.

Testimony of Paty, pp. 424 to 433.

He testified that the object of the voyage was to take Andres Castillero "a passenger and his servant to Acapulco." He added, "I remember the circumstance of his servant coming on board for his luggage" (*Q.* 5 and 25).

This witness's log book had been burnt (*Q.* 9). He produced two port documents relating to this voyage, and testified that both of them were incorrect (*Q.* 22, 23).

He further testified as follows:

Q. 10.—Look at the document marked "J. P. No. 1," now attached to this deposition, and state what it is, and by whom written?

A. 10.—This is extracts from the journal kept on board of the Don Quixote, and written by myself. This journal was my wife's private journal, and from that journal and my private papers I made these extracts.

Q. 11.—Are you able to state that this is a correct memorandum?

A. 11. Yes, sir. (The document "J. P. No. 1" is objected to by claimant's counsel.)

This exhibit J. P. No. 1 is on page 429. It purports to be "Information for whom it may concern;" it bears date Honolulu, 9th July, 1857, and is in form a diary or journal of the events of the said voyage of the Don Quixote, drawn up in eighteen distinct articles. One of them is:

"*Third.* Don Andres Castillero and his servant or companion (Lazaro Piña I think *was* his name), Mrs. John Paty, child and servant, were passengers."

To rebut this, the claimant produced the following evidence:

Wm. F. Swasey, clerk to Larkin, the Consul at Monterey, and called his attention to the testimony of Messrs.

Reynolds and Sloat. Swasey answered as follows (p. 2662, *A.* to *Q.* 17):

"They are both certainly mistaken, for I know that Mr. Larkin sent despatches to the Secretary of State in March, 1846, by the brig Hannah. I know further that the Portsmouth came to Monterey in April, 1846, in consequence of the news of Fremont's difficulties having reached Mazatlan in March, 1846; I know it further from the fact that, on the 23d of April, 1846, Mr. Larkin wrote a letter to Mr. Archibald H. Gillespie, an extract of which is in the following words: 'Consulate of the United States of America, April 23d, 1846. Sir, Captain Montgomery of the Portsmouth being under sailing orders (the first or second instant) at Mazatlan, was waiting for the Mexican mail, when Commodore Sloat heard, per brig Hannah, of the situation of Capt. Fremont, near San John's, and immediately despatched the ship. She was twenty-one days from Mazatlan to Monterey.'

"A copy of this letter is recorded in my own handwriting in the book exhibited 'Copies of official letters,' etc."

The letter book of Consul Larkin contained a copy of a letter to John C. Fremont, dated March 8, 1846, referring to a communication made "last week": "I then informed you that there was an American brig (brig Hannah) of Salem, at anchor in this port, bound to Mazatlan, whose supercargo I had requested to remain here until the third day, to enable you to send letters to the United States, if you were so inclined" (*p.* 2667).

Frederick H. Larkin, son and executor of Consul Larkin, produced the Consul's book containing memoranda of arrivals and departures. It contained, under date of Feb. 12 1846, "brig Hannah, from Mazatlan," and under date of March 7, 1846, "brig Hannah, for Mazatlan" (*p.* 3019, *Q.* 4, 5).

He also exhibited, from his father's files, an original letter, addressed by Mott, Talbot & Co., to the Consul, dated Mazatlan, April 1, 1846, containing these words: "Your letters have this moment reached us,

per 'Hannah,' * * just anchored," and referring him for news "to our good friends of the Portsmouth."

Exhibit Larkin, No. 2, p. 3020.
Testimony of William Hooper, p. 3022.

The fact that the "Hannah" sailed from Monterey early in March, 1846, was thus distinctly established. And the letter of Castillero to Vallejo, written at Santa Clara (p. 2605), stating that she had sailed March 4, harmonizes perfectly with the deceased Consul's communication to Fremont that he had detained her three days and his memorandum that she sailed on the 7th March.

A newspaper printed in the city of Mexico on April 22, 1846, called the "*Diario official*" was produced. It was therein stated that this vessel had arrived at Mazatlan on April 1st, five days' sail in ballast from San Blas. The same paper issued April 5, 1846, and another newspaper printed in the city of Mexico on April 6, 1846, were produced, and each contained a statement that the Government had "received news from Upper California down to the 5th of" March, 1846.

See testimony of Castillo Lanzas (pp. 2353 to 2355).

Ex-President Herrera, Professor Del Moral, and Lazaro Pina were all dead when this question arose. Consequently there was no direct proof that the latter sailed in the "Hannah."

Neither was there any evidence to the contrary; for Captain Paty's written narrative was not admissible as evidence. And, if received, it could have little weight.

Ressel v. *Hudson R. Railroad Co.*, 17 *N. Y. R.* 3 *E. P. Smith, p.* 134.

But there is ample evidence that some one brought

the letters and specimens to Professor del Moral, at the city of Mexico, in April, 1846, before Castillero arrived in that city.

On or before 23d April, 1846, Del Moral presented the letters and specimens to the Mining Board.

Actas, p. 3186. *Also p.* 997 *Q.* 20.
Espedientes, p. 1783, 1784, 1809.

When the Professional Board of the College was called upon to make an assay, the work was already done. And accordingly it was "resolved that a report be made in conformity with what had already been done" (p. 1813).

Another attempt to impeach Castillero's statements.

It has been seen that Castillero himself arrived in the City of Mexico early in May.

The Government, by the aid of Mr. Sloan, the Counsel for the Berreyesa claimants (p. 2845), took great pains to verify the fact of this journey. Captain *John Paty* testified that his bark, the Don Quixote, chartered by the Mexican Government for a voyage to Acapulco and back to Monterey, sailed from that port April 3, 1846, with Don Andres Castillero, his servant, baggage, and some specimens of ore, but no other cargo. That he arrived at Acapulco April 21, 1846, landed Castillero, waited for his return until June 16, and hearing nothing of him, returned to Monterey.

Testimony of Paty, p. 424 *to* 433.

On this evidence an attempt was made to question the arrival of Castillero in the City of Mexico, as early as May 6, 1846, when, according to the *actas* of the *Junta de Fomento,* he presented himself before that Board and made a verbal report in relation to his discovery (p. 3193.)

But it was only a suggestion. There was no proof in support of it (p. 2365 to 2368.)

Still another criticism on Castillero's statement.

The application of Castillero for aid and encouragement eventuated in the concession of all that he asked for.

An agreement was made between him and the Mining Board in conformity and a notary was directed to draw it up. One of the things agreed to was that $5000 should be lent to Castillero by a draft on a house at Mazatlan.

Why was not this agreement executed? say the Government's counsel. Why did not Castillero obtain the draft?

It was answered that in consequence of apprehended necessities the Government issued an order stopping the usual payments appropriated for encouraging the production of quicksilver (p. 1938).

But there was an apparent discrepancy in dates. The Board had proposed to enter into the agreement, May 14, 1846; and the Government had approved of it May 20th, 1846. The order stopping payments was dated May 2, 1846 (p. 1708, section 1).

To this it was answered that the construction of that order of May 2, 1846, was a subject of doubt and discussion. And it was not settled between the Mining Board and the Treasury Department that the payments should be stopped until May 27th or 29th, 1846. The evidence on this point was very distinct and explicit.

Testimony of Mr. De Bassoco, pp. 1227 to 1230.
Actas or Minutes of the Mining Board, pp. 3193, 3197.
Minutes of May 29, 1846, p. 3206,
Testimony of Professor Balcarcel, pp. 1922 to 1926.

A discrepancy in dates was found in a public official document; and upon that discrepancy another criticism was hinged. In the report of Lafragua, Minister of Relations, read before the Congress of Mexico in December, 1846, the transaction between Castillero and the Mining Board is mentioned, and it is stated that the order suspending payments, which prevented the execution of the agreement between Castillero and the Mining Board, was dated September 19, 1846 (pp. 17, 72, 73, 1710, 1711).

As the order suspending payments made May 2, 1846, was thought too early, so the order of Sept. 19, 1846, seemed to the counsel of the Government to be too late. But this criticism, like all the others, is easily answered.

The Minister Lafragua, in his report, gave a narrative of transactions occurring previously to his coming into office. He acted, of course, upon reports made to him from the proper officers or bureaus. On Sept. 19, 1846, the Treasury Department issued an order for a loan of $25,000 from the quicksilver fund. This gave rise to another, and an exceedingly sharp discussion, between the Mining Board and the Ministry. The Board, in framing its report of Nov. 17, 1846, to Minister Lafragua, by an inadvertence, inserted in this place, the date of the Sept. order instead of the date of the May order. Of course, the Minister adopted the statement.

Minutes of the Mining Board, Sept. 21, 1846, pp. 3247 *to* 3250.

See also Minutes, pp. 3254, 3257.

Segura's Report to the Minister, dated Nov. 17, 1846, pp. 1738, 1752, 1753.

POINTS.

First Point.—The facts asserted by the claimant as the basis of his claim, were fully established.

I. The dispute concerning the fact of registry and judicial possession in December, 1845, scarcely deserves notice- The proof is explicit, and uncontradicted. It stands perfectly free from any impeachment whatever.

II. The confession imputed to Alexander Forbes, by means of the pretended copy of a letter dated March 28, 1848, is the only thing having any tendency to throw doubt upon the genuineness of the two-league grant. And there is not to be found in the record any evidence that the alleged original ever existed, on which a court of law could properly act.

1. James Alexander Forbes has not the *status* of a credible witness. The unanimous voice of his neighbors has outlawed him. This should deprive his testimony of effect, and relieve the claimant from the necessity of disproving his statement, unless its inherent probability, or some extrinsic support requires the court to credit the fact although unable to place confidence in the witness.

2. Robert Birnie was evidently a co-conspirator with his connection, James Alexander Forbes. And from their omission accurately to rehearse their parts, Birnie stands convicted of uttering

under oath, on his examination, at least one wilful falsehood. Where a witness makes an untrue statement which cannot reasonably be imputed to mistake, *falsus in uno falsus in omnibus* is a rule of unexceptionable justice. Morals and sound policy alike enjoin upon courts the duty of applying it. It follows that Birnie's endorsement affords no aid to the testimony of James Alexander Forbes, but adds to its discredit. Fraud and falsification are rarely the work of a single hand or head. The introduction of Birnie reveals their usual concomitant—a conspiracy.

Curia per Story J. Santissima Trinidada, 7 *Wheaton*, 339.

3. The allegation that such a letter existed, and was stolen from Forbes' carpet-bag, is not probable in itself, nor has it a single extrinsic support, independently of the mere affirmations of J. A. Forbes and Birnie.

III.—The circumstances tending to establish that the pretended letter of March 28, 1848, was a fabrication, are numerous and impressive.

1. The combination of two such witnesses as J. A. Forbes and Birnie, in the bag and letter narrative, justifies, at the very outset, grave suspicions of its verity.

2. The inherent improbability of that narrative is alone sufficient to discredit it. The loss of a pretended original as an excuse for relying upon a fabricated copy, is a frequent device. A story of precisely this kind was

told during a somewhat famous jury trial at Cooperstown, Otsego county, N. Y., in the autumn of 1845. J. A. Forbes' bag and letter statement is an exact photographic reproduction of that story in all its details down to the most minute and trifling accessories. That story was probably J. A. Forbes' precedent; for California was full of recent comers from the Atlantic states.

Harris v. Clark, 3 *Comstock's R.* 93.

3. The want of congruity between this pretended letter of March 28, 1848, and the acknowledged correspondence immediately preceding and succeeding it, should condemn the paper as a palpable forgery.

4. The record exhibits many other considerations impeaching the credit of this pretended letter. Among them may be noted:

A. J. A. Forbes' evident forgery and falsehood in producing a pretended copy of his own letter, dated October 28, 1849.

Transcript, pp. 392, 844.

B. The non-production of this pretended letter of March 28, 1848, to Laurencel in 1857, when J. A. Forbes sold for $20,000 the use of his budget.

C. The pressure of confrontation with his own letters obtained from Mexico after his first examination, evidently stimulated J. A. Forbes to this last desperate effort.

D. Unless the pretended letter of March 28, 1848, with its two supporters, J. A. Forbes and Birnie, can be deemed strong enough to bear down all the Mexican officials who have been examined in California, that letter must fall to the ground as evidence, by the force of a direct contradiction.

E. The U. S. have proven that Castillero went to Mexico in April, 1846. He produced the Castillo-Lanzas despatch to Mr. Negrete in December, 1846. Had he omitted to ask the Government for aid from his arrival in May until July 7, 1846, and yet, after the latter date, and before December 17, 1846, induced many of its high officials to unite in a scheme of fraud, forgery, and falsification of their own records? Is such a suggestion credible?

F. This pretended letter asserts that Castillero had obtained antedated documents in Mexico. If this was true, how does it happen that in all the subsequent letters of J. A. Forbes there is no reference to any such circumstance?

IV. Notorious facts which cannot be disputed or materially post-dated, or ante-dated, raise so strong a presumption in favor of the claimant's allegations, that, in the absence of all written evidence, it would be a legitimate inference that transactions essentially of the nature indicated by his title papers, did actually occur at the very times alleged.

1.—A very productive quicksilver mine, such as this appeared to be, and has proven to be, was a *desideratum* in Mexico of the very highest importance. In November or December, 1845, Castillero discovered this mine, and he had some knowledge of the Mexican laws touching registry, denouncement, etc., to secure the discoverer's right. It is a just inference, that unless he was insane or singularly regardless of his interest, he took the most appropriate steps that his judgment could devise and accessible facilities would permit. The proceedings before the Alcade are precisely such as the circumstances would naturally have given rise to, and there was no means of resorting to any other. That these proceeding could have been omitted is an incredible suggestion.

2.—Castillero went to Mexico, and arrived there early in May, 1846. The Mexican laws held out through the Junta de Fomento, their administrators in this behalf, large pecuniary rewards for the discovery and production of quicksilver. (*Halleck's Collection*, p. 452, 453.) If, three days after the arrival of Castillero, an earthquake had swallowed up the city and all things therein, it would not be seriously doubted that Castillero had presented himself to the *Junta* before the catastrophe, related his fortunate discovery and solicited governmental aid and protection.

3.—There was news of hostile movements by the United States against Mexico prior to, or concurrently with Castillero's arrival. The

moderation of his prayer for aid may reasonably be attributed to the supposable condition of the public treasury in that hour of peril.

Halleck's Collection, pp. 452, 453,
Decree of May 2, 1846; *Transcript p.* 1708.

SECOND POINT. "The two square leagues upon the land of his mining possession" were granted to Castillero by the Supreme Government of the Mexican Republic in a valid and effectual manner.

I. The fact that there was no survey or juridical possession, is perfectly immaterial.

Fremont vs. *United States,* 17 *Howard,* 563.
United States vs. *Reading,* 18 *Howard,* 6, 7.
United States, vs. *Larkin,* 18 *Howard,* 563.
United States vs. *Vaca and Pena,* 18 *How.,* 556.
United States vs. *Sutherland,* 19 *Howard,* 364.
Yontz vs. *United States,* 23 *Howard,* 497.
United States vs. *Castillero,* 23 *How.,* 468, 469.

II. The non-delivery of the despatch of Castillo-Lanzas as Minister of Relations, to the Governor of California is equally immaterial. The despatch was an official promulgation of the Government's decree of concession, and placing it in the hands of the grantee was the most appropriate and effective delivery that the case admitted of. He needed no other paper or further evidence of his right, even if it be true that, in point of form, a survey and juridical delivery of possession under the Governor's order were necessary to vest a perfect *legal* title.

III. The concession of the two square leagues pursuant to the eighth item in Castillero's petition, was a present, consummated grant. It left no room for failure or further official action, save in executing the mere formalities of a survey and juridical possession.

1. The petition of Castillero was, in direct terms, for an immediate grant of the land.

2. The language of the *acuerdo* was a direct and explicit assent to Castillero's petition.

Smith vs. *United States*, 10 *Peters*, 332.
Yontz vs. *United States*, 23 *Howard*, 498.

3. Neither the communication of the Minister of Justice to the Ministry of Relations, nor the despatch of the latter to the Governor of Californias contemplated a grant by the latter, or the exercise by him of any discretionary power. He was not directed to issue a grant or title, but to give the "orders" which the case required, i. e., for a survey and juridicial possession.

United States vs. *Castillero*, 23 *How.*, 468, 469.

IV.—The Executive of the Republic had power to make such a grant by his own direct act without observing the forms prescribed in the regulations of 1828, or any other formality.

Delassus v. U. States, 9 *Peters*, 133, 134.

1. Under the Federal Constitution of 1824 the Californias were a "*territory*," and, consequently, the public lands therein were, by the law of 1824, s. 16, placed at the disposition of the Federal Executive.

White's Recopilacion, pp.
U. S. v. Argnello, 18 *How.*, 549.
U. S. v. Cambuston, 20 *How.*, 63.
Fuentes v. U. S., 22 *How.*, 454.
U. S. v. Vallejo, 1 *Black*, 554.

2. It cannot be maintained that the President curtailed or diminished his own official powers under the 16th section of the Colonization law of August 18, 1824, when, on November 21, 1828, he "dictated" to the Governors of the territories, as his subordinate agents, "some general rules for facilitating its execution." The forms which he prescribed for observance by these agents, by his own sole act constituted, were indeed laws to them, but surely they did not restrain the law-giver himself.

See the Law of 1824, *and the Regulations of* 1828, 31*st Cong.*, 1*st Session, Executive Doc.*, 18, *pp.* 38, 39.
Mr. Peachy's Arg't., pp. 362, 368 *to* 372.

V. Paredes, who was President at the time this act was granted, exercised all the powers of government. There was no written constitution in force; there was no legislative body in being; nor was there any existing law whereby such body could thereafter come into being. For this latter purpose, or for carrying on the administration in the interim, resort could only be had to

the extraordinary powers then exercised by Paredes. Without claiming for him absolutely despotic powers, it would seem clear that all acts of his administration which were just and reasonable in themselves, conformable in substance to the established policy of the Republic, and performed in perfect good faith, should be held valid as between the Government and private individuals, whether the precise methods of procedure prescribed by previous laws were observed or not.

Mr. Peachy's arg't., pp. 384 *to p.* 412, *and authorities there cited.*

United States v. Castillero, 23 *How.,* 468, 469.

THIRD POINT.—Independently of any action by the Supreme Government, Castillero acquired under the laws of Mexico a perfect title to the mine itself; being a surface of legally definite boundaries, together with all things beneath to the centre of the earth, as in the case of other ownerships in the realty.

I. Under the Spanish and Mexican laws, an ordinary grant of lands by the Government conveyed no title to the mines and minerals within the bounds of the tract granted. These remained a portion of the public domain.

Mr. Peachy's argument, pp. 240, 243, 244, *and authorities there cited.*

1 *Heathfield's Gamboa,* 136, 7, 8.

Ordinances of 1783 *title V. Halleck's Collection, pp.* 222. 223.

Also, title VI., article 14, *Halleck's Collection, p.* 228.

II. Under laws which, with occasional modal variations, had existed for centuries, and were in force

in California at the time when that country was acquired by the United States, the discoverer of a mine was rewarded by an investiture, *ipso facto*, with a perpetual property and ownership of the mine, and an ascertainable amount of surface by the name of *pertenencias*, or mining spaces. And as all mines not expressly granted by that name were parts of the public domain, it was of no actual legal moment to the discoverer whether the mine which he had brought to light, was in public or private land.

Same authorities.

And see ordinances of 1559 *in Halleck's Collection pp.* 6 *to* 15—*Ordinances of* 1563, *same book p.* 17 *to* 61.

Ordinances of 1584, *same book, p.* 69 *to* 123.

Ordinances of 1783. *Title VI., article* 1. *To a right,* 3 *pertenencias. Same book, p.* 223.

Ordinances of 1783, *title XI., article* 1, 2, *for a partnership, four additional pertenencias.—Same book, p.* 252.

Ordinances of 1783, *title VIII, article* 2 *to* 9, *measure of pertenencias. Same book, p.* 234, 235.

III. The laws in force at the time of Castillero's discovery prescribed certain forms for the purpose of protecting the discoverer of a mine in his possession and title. He was directed to represent the fact to the proper local judicial authority, and that tribunal was required to register it and to perform certain acts to give the possession to the discover.

Ord. of 1783, *tit. VI, art.* 4. *Halleck's Collection, pp.* 224, 225.

IV. The principal, if not the only, object of the Government in instituting this procedure, and

requiring its observance, was to secure a prescribed royalty on all minerals. (1 *Heathfield's Gamboa*, p. 143.) Quicksilver was a royal monopoly. In 1811, the monopoly of quicksilver was relinquished, as well as all duties therefrom, and rewards for production established instead thereof.

Decree of Cortes Jan'y 26, 1811, *and letter of the Council of Regency to the Tribunal General of Mexico. Halleck's Collection, pp.* 381, *to* 385.

Act of Mexican Congress, Oct. 7, 1823. *Halleck's Collection, pp.* 403, 404.

Decree of Dec. 2, 1842, *Art.* 10, *Halleck's Collection, p.* 437.

Decree of May 24, 1843, *Halleck's Collection, pp.* 452, 453. *Decree July* 5, 1843. *Halleck's Collection, pp.* 454, 455.

Since quicksilver mines were placed on this favored footing, these forms were only important to the discoverer himself. They served as his protection against judicial proceedings by a rival claimant to the merit of discovery, or against unjust claims by a neighboring miner, or by the individual grantee of the surface. When there were no neighboring miners, and the surface was public land, the observance or non-observance of these forms was, in every sense, the merest of inconsequential ceremonies.

V. A special local tribunal, known as the "Mining Deputation," possessed the jurisdiction in these matters. Nevertheless, a resort to the Alcalde's

jurisdiction was proper at the time and place of the discovery in question.

Decree of Dec. 2, 1842, *Title* 4, *Halleck's Collection*, 441, 442.

Ord. of 1783, *Title* 2, 3. *Same book*, 201, 206.

1. There never had existed in California a mining deputation or any special mining tribunal of any kind. And it is a general rule of the Spanish and Mexican laws, that judicial authority conferred upon special tribunals devolves upon the ordinary tribunals whenever the special tribunals do not in fact exist, or are incapable of acting.

   Mr. Peachy's arg't, 326 *to* 340, *and authorities there cited.*

   See especially decree of Mar. 2, 1843, directing that in California justice be administered in the first instance by judges of that grade, and if there be none by alcaldes, or justices of the peace. *Observador Judicial*, &c., of 1843, p. 230, 231.

VI.—If the ordinary tribunals had no jurisdiction under the mining laws or under the general rule last adverted to, or if the proceedings of the Alcade were not strictly regular, or were for any reason ineffectual, the title of Castillero as discoverer would not, therefore, fail. Neither by denouncement, rival registry or otherwise has any individual ever acquired a title to supplant him; and consequently, as between Castillero and the Mexican Government, his title, founded on the meritorious consideration

of discovery, was perfect in equity on the 7th July, 1846, when the Mexican authority ceased to exist in California.

FOURTH POINT.—The action of the Executive Government of Mexico, in May, 1846, was intended to be and was in law and fact, a ratification of Castillero's mining possession. Whether such ratification applied to a space 6,000 varas square, or only to the very moderate excess of fifteen *pertenencias* according to the interpretation given by the *Junta de Fomento* to Castillero's prayer for confirmation, is left out of view for the present as a distinct question.

I.—Castillero, in his seventh article, distinctly prayed for a ratification of his mining possession. The object of that prayer was elaborately explained to the Government by the *Junta*. That body expressly stated that "the "possession given to Senor Castillero by the "local authorities of California, has not been "been in conformity with the ordinance;" yet, by reason of the great merit and public value of the discovery, it had "no hesitation in recommending said petition." This petition was "granted." It, therefore, appears that under a decided conviction on the part of the *Junta* and the Executive that the proceedings before the local authorities in California were not valid, for the excess beyond seven *pertenencias*, the Executive intended to grant and confirm to Castillero the mining possession which had been given to him.

II.—The President possessed full power thus to ratify Castillero's mining possession.

1.—By the ancient laws of Spain the Executive, i. e., the Viceroy, had power to extend such special and unusual privilege to mining enterprizes of great merit or value.

And this power remained in the Executive after the revolution by which Mexico became an independent Republic.

Ord. of 1783, *title VI, art,* 17, *Halleck's Collection, p.* 229.

Ord. of 1783, *title XI, art.* 1. *Halleck's Collection, p.* 252.

Lares derecho administrativo 93, 91, *Mr. Peachy's arg't, pp.* 349 *to* 351.

2.—The argument in respect to the powers of President Paredes to grant the public domain in the "territories" applies with equal force to this alienation of the public domain in mines.

3.—If Paredes possessed the whole authority of the Government, as above suggested, Point Second, Division V., his power to ratify this possession requires no argument.

III.—The want of such explicit words of confirmation as the author of "The Touchstone" would have employed, cannot be alleged against the efficacy of a Spanish Executive act. The import

and effect of the latter present only questions of intent and power, in the most enlarged and liberal use of those words. The intent to confirm, if there be any lack of express words, is a "necessary implication."

FIFTH POINT.—The confirmation by the Supreme Government may fairly be construed as extending to the 6,000 varas square.

SIXTH POINT.—The title as owner of a mine acquired by discovery or denouncement and registry under the mining laws of Mexico, is within the jurisdiction conferred by the Act of March 3, 1851.

I.—The title of a mine-owner is not merely to the minerals beneath, but to the surface and the minerals. It is in no respect distinguishable either in the exclusiveness of the holding, or in its duration, from any other permanent estate in land.

Mr. Peachy's argument, pp. 221 *to* 242, *and authorities cited. Also pp.* 285 *to* 289.

1. The directions of the ordinances that stakes be set marking the bounds of the *pertenencias*, or mining spaces, and confining the miner's title as well beneath the surface as

at the surface to these lines, make this perfectly manifest.

{ *Ordinance of* 1783, *title VIII, article* 11, *Halleck's Collection, p.* 236.

{ *Ordinance of* 1783, *title VIII, article* 14, 17, *Halleck's Collection, pp.* 237, 238.

2. The provision that the miner shall pay for the land of which he occupies the surface, according to the valuation of experts, mutually chosen, does not militate against this idea, but confirms it. For, instead of a forfeiture resulting from non-payment, the miner becomes a debtor to the surface owner, for what may be ascertained as the proper value of the surface.

{ *Ordinance of* 1783, *title VI, article* 14, *Halleck's Collection, p.* 228.

1 *Heathfield's Gamboa,* 133, *sec.* 6.

3. The omissions of the Alcalde in not measuring the *pertenencias,* and in not setting up the stakes, are not material in this case. It is as easy now to declare the number of the *pertenencias* and to measure their extent, as it is to ascertain the extent and boundaries in most cases of colonization grants.

The mining laws of Mexico allowed a miner, after he had fixed his stakes, to improve their position if subsequent discoveries should enable him to do so, wherever it would not interfere with a neighboring miner's location. This proves that a fixed location of the *pertenencias* was not essential to a miner's title.

Ord. of 1783, *Title VIII, Art.* 2, *Halleck's collection, p.* 236.
Mr. Peachy's arg't, pp. 316 *to* 325.

A neighboring miner might require the stakes to be fixed; but the act might be deferred without prejudice to the mining title until thus quickened.

Ord. of 1584, *Art.* 24 *to* 31. *Halleck's collection, pp.* 81 *to* 84.
1 *Heathfield's Gamboa, p.* 297 *and onward.*

II.—Even if the mine-owner's estate was limited to the space occupied by the mineral, the jurisdiction to determine upon the claim would be perfect.

1. Under the treaty of Guadalupe Hidalgo, protection is promised to all "property of every kind" within the ceded territory. See § 8.

U. S. v. Rose, 23 *Howard*, 272.
U. S. v. Kingsbury, 12 *Peters*, 476.
U. S. v. Noe, 23 *Howard*, 317.
U. S. v. Fossat, 21 *Howard*, 450.

2. The Act of March 3, 1851, virtually confiscates all land not protected by the allowance of a private claim pursuant to its provisions.

3. Such a substantial, permanent and exclusive interest in real estate, as the mine-owner's title under the mining laws of Mexico,

is "*property*" within the true intent and meaning of the treaty, and it is consequently "*land*" within the true intent and meaning of the Act.

Canfield v. Ford, 28 *Barbour's N. Y. R.*, 336.

King v. Rochdale Water Works, 1 *Maule & Selwyn*, 634.

Rex v. Mayor of Bath, 14 *East*, 609. 618.

King v. Chelsea Water Works, 5 *B. and Adolph.*, 156, 169.

Queen v. E. London Water Works, 18 *Queen's Bench*, 716.

Hayes v. Richardson, 1 *Gill & Johns.*, 366, 376.

Saunder's case, 5 *Coke*, 12.

See Mr. Peachy's argument, p. 291 *to* 298.

American Law Register, Phil'a., for August, 1862, *being Vol.* 1, *No.* 10, *new series, p.* 577, *Article "Horizontal Divisions of Land," and authorities there cited.*

4. Even if it were impossible under existing laws and usages to frame a patent adapted to the case, the law of nations, the principles of equity and the public faith should not be violated on that account. This court should still allow the claim, leaving Congress to supply any additional forms that might be needed to assure the property to its owner.

Kendall v. King, 17 *Com. Bench R.*, 483, 500, 503, 509.

5. There is no difficulty in framing a patent adapted to the case.

Grant v. Raymond, 6 *Peters*, 236.

SEVENTH POINT.—The declaration of the Mexican Commissioners that no grants of land in California had been made subsequently to May 13, 1846, is of no weight.

I.—The Government of the United States has rejected it as not constituting any part of the treaty.

Transcript p. 2957 *to* 2964, *and documents there cited.*

II.—It was made whilst neither the Mexican Government or its Commissioners had any access to the public archives; it involved at most a very slight misrecollection of dates, and in reference to a single grant of very trivial extent. It has no probative force.

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